Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

EXXON MOBIL CORPORATION, *et al.*,
Petitioners,

v.

GRANT BAKER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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110 pp

QUESTION PRESENTED

The undisputed evidence below showed that at a time when the jury in this case was reporting itself deadlocked, the court officer in charge pulled out his gun, removed a bullet, held it out to a juror, and suggested that a dissenting juror should be "put out of her misery." The jury thereafter returned a verdict against petitioners for $5 billion in punitive damages. The court officer committed perjury to conceal his misconduct. When the officer's misconduct subsequently came to light, the district court refused a new trial; the Ninth Circuit affirmed on the ground that no *presumption* of jury prejudice from the misconduct applied, and that petitioners had failed to carry their resulting burden to *prove* prejudice from the misconduct.

On this record the following question is presented:

Whether this Court's decisions in *United States v. Mattox*, 146 U.S. 140, 150 (1892), and *Remmer v. United States*, 347 U.S. 227 (1954), holding that improper ex parte contacts with the jury establish a rebuttable presumption of prejudice, remain good law, as the First, Second, Seventh, Tenth, and Eleventh Circuits have held, or whether intervening decisions of this Court have implicitly overruled those decisions, as the Sixth Circuit has held, or cut back on them, as the Third, Fourth, Fifth, Eighth, and Ninth Circuits have held.

PARTIES AND CORPORATE DISCLOSURE

Petitioners are Exxon Mobil Corporation (formerly Exxon Corporation) and Exxon Shipping Company, defendants below. Exxon Shipping Company is a wholly-owned indirect subsidiary of Exxon Mobil Corporation. No publicly held company owns 10% or more of the stock of Exxon Mobil Corporation.

Respondents in this case were plaintiffs in the court below. They are Grant C. Baker, Alaska Sport Fishing Association, Louie E. Alber, Ahmet Arturner, Jeffrey Bailey, William Bennett, William Wayne Bullock, Robyne L. Butler, Albert Ray Carroll, DEBRA LEE, Inc., Dew Drop, Inc., Larry L. Dooley, Mary Doumit, Steve Doumit, Douglas R. Jensen, Dennis G. Johnson, Donald P. Kompf, Sr., Josef Kopecky, Daniel Lowell, Andrean E. Martusheff, Carol Ann Maxwell, Jacquelan Jill Maxwell, Robert A. Maxwell, Sr., Michael McLenaghen, Elenore E. McMullen, Leslie R. Meredith, Native Village of Tatitlek, Leonard S. Ogle, Steven T. Olsen, August M. Pedersen, Jr., Mary Lou Redmond, Joseph David Stanton, Jean A Tisdall, and Darrell Wood, individually and as representatives of a mandatory punitive damages class.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Exxon Mobil Corporation, *et al.* (collectively "ExxonMobil"), respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in *Sea Hawk Seafoods, Inc. , et al. v. Alyeska Pipeline Service Co., et al.*, 206 F.3d 900 (9th Cir. 2000).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in this case is published at 206 F.3d 900, and is reprinted in the Appendix to this Petition ("App.") at 1a. The opinion of the United States District Court is unreported and is reprinted at App. 24a. An amended district court opinion, with technical corrections, is reprinted at App. 46a.

JURISDICTION

The decision of the Court of Appeals was filed March 16, 2000. On May 26, 2000, Justice O'Connor extended the time for filing this petition to July 14, 2000. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution provides in pertinent part,

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .

The Fifth Amendment to the Constitution provides,

> [N]or [shall any person] be deprived of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

This case involves the fundamental right to a fair and impartial jury. In *United States v. Mattox*, 146 U.S. 140, 150 (1892), and *Remmer v. United States*, 347 U.S. 227 (1954),

this Court held that any ex parte communication with the jury creates a risk that the jury will improperly decide the case on the basis of extrarecord influences. Proof of the existence of such outside contacts, these cases held, therefore creates a presumption that the jury was prejudiced, shifting the burden to the party defending the verdict to establish that the contacts did not, in fact, result in prejudice to the jury.

In this federal admiralty case, the Ninth Circuit refused to apply the *Mattox/Remmer* presumption, and instead imposed upon petitioners the burden of proving that prejudice had actually occurred – a burden that is for all practical purposes nearly impossible to carry, since Federal Rule of Evidence 606(b) renders inadmissible evidence of what factors actually influence a jury's verdict. The Ninth Circuit held that petitioners had the burden of proving actual prejudice despite an undisputed record that the Court Security Officer ("CSO") in charge of the jury in this important and highly publicized case, after repeated improprieties and at a time when the jury was at an impasse, took a bullet out of his gun, held it out to a juror, and suggested that a dissenting juror should be "put out of her misery" – thereby taking sides with the majority against the minority. Shortly thereafter, the jury awarded $5 billion in punitive damages against petitioners.

On these facts, the question presented is whether the "presumption of prejudice" rule established in *Mattox* and *Remmer* remains good law. Those cases have never been overruled. But the Sixth Circuit now holds that ex parte communications *never* create a presumption of prejudice, and that the party challenging the verdict thus always bears the burden of proving prejudice. The First, Second, Seventh, Tenth and Eleventh Circuits, by contrast, continue to follow *Mattox* and *Remmer*, and hold that a presumption of prejudice arises in all cases involving improper outside contacts with the jury. In the other circuits, confusion prevails: like the Ninth Circuit here, the Third, Fourth, Fifth, and Eighth Circuits hold that the presumption applies in *some* cases, but

not in others. And each of those circuits draws the line differently.

The controversy over the continued vitality of the *Mattox/Remmer* rule arises here in the context of a claim for punitive damages against a large corporation, a situation in which this Court has recognized the especially acute danger of jury prejudice. *See Honda Motor Co. v. Oberg*, 512 U.S. 415, 431 (1994) ("If anything, the rise of large, interstate and multinational corporations has aggravated the problem of arbitrary awards and potentially biased juries."). For that reason it is especially important to ensure that the jury is fair and impartial in fact, not merely in appearance, and that fair and sound procedures are followed before punishment is inflicted. *Id.* at 431-32. The $5 billion verdict in this case was the product of anything *but* fair and sound procedures in respect to the critical, constitutionally-based requirement that the jury's deliberations must not be affected by any outside influences. Despite all that happened, and despite the rule enunciated in *Mattox* and *Remmer*, neither the district court nor the Court of Appeals was willing to presume that the deliberations, which produced a literally unprecedented verdict, had been adversely affected. This case perfectly illustrates the importance of the *Mattox/Remmer* rule and why the Court should clarify the confusion in the lower courts on this issue.

A. Factual Background

This case arises out of the litigation in Alaska following the grounding of the tanker EXXON VALDEZ in Prince William Sound on March 24, 1989, and the resulting oil spill. ExxonMobil stipulated to liability for compensatory damages, having previously spent over $300 million voluntarily to pay claims, as well as over $3 billion in clean up and restoration costs. The jury here passed on plaintiffs' claims for punitive damages, and on certain issues as to the *amount* of compensatory damages. Trial (before the Honorable H. Russel Holland) was in three phases in the summer of 1994, with

the jury deliberating after each phase, for a total of 41 days. In Phase I, the jury found that Captain Hazelwood, the Master of the vessel, had been reckless; having been instructed that Hazelwood's recklessness was to be imputed to ExxonMobil, the jury found ExxonMobil reckless as well. ER 63.[1] In Phase II, the jury awarded compensatory damages, which came to $ 19,590,257 after deductions for payments already received by plaintiffs. ER 65, 187. In Phase III, the jury awarded punitive damages of five billion dollars. ER 81.

While its appeal from the judgment on this verdict was pending, ExxonMobil discovered an extraordinary set of facts regarding the jury's deliberations. The facts reported below come from four different sources. First, there is the record of the 1994 trial. Second, on June 13 and 14, 1995, the district court took testimony from ten of the eleven jurors. Third, in the fall of 1995 the United States Marshals Service conducted an investigation into the misconduct of court security officer Donald Warrick. Fourth, in March 1998 the district court took testimony from the remaining juror, Rita Wilson.[2] We set out first the facts as they emerge from these various sources. Thereafter we describe the tortuous process by which the facts came to light.

1. *Intrusion Into the Jury's Deliberations*

The Court Security Officer ("CSO") primarily responsible for the jury during its deliberations was Donald Warrick. JTr. 261:14-23; ER 266-67. Warrick was hired in March 1994 by General Securities Service Corporation, a private

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[1] "ER" refers to the Joint Excerpts of Record below; "CD" refers to the Clerk's Docket; "JTr." refers to the transcript the jurors' questioing in June 1995; and "WTr." refers to transcript of Juror Wilson's questioning in March 1998. The trial transcript is cited as volume/page:line.

[2] The opinion below refers to Mrs. Wilson as "Juror A" and to Juror Doug Graham as "Juror B." The parties' briefs in this case were ordered unsealed, however, and the identities of these jurors and the facts involved in this case were printed in Alaska newspapers and are all a matter of public record.

company engaged by the United States Marshals Service to provide security at the federal court house in Anchorage. ER 225, 253. Warrick had no experience as a bailiff, and was given no training in how to behave with jurors. ER 323:19-324:11; ER 279-80, 303. He was nevertheless put in charge of the jury in one of the largest, most controversial, and widely-publicized cases in the history of the federal courts.

Warrick's lack of training soon revealed itself. On the weekend of July 4, 1994, Warrick attended a barbecue with most of the jurors at a juror's house. JTr. 50:25-52:15, 78:12-79:12, 140:3-4, 262:17-64:2. He volunteered his opinion – just after they had found ExxonMobil reckless and potentially liable for punitive damages – that they were "doing a good job." ER 286. The jurors who attended the barbecue were made uncomfortable by Warrick's presence; several of them thought correctly that it was entirely improper for him to be there. JTr. 51:24-52:10; ER 277, 283, 285, 286; *see* 38/6985:16-18. In other contexts, as well, the jurors noticed Warrick's interest in their affairs, describing him as "very nosy and overly interested in what they were doing." ER 286. Jurors commented that whenever they opened the jury room door they would find Warrick leaning against the wall as if to eavesdrop on their deliberations. JTr. 212:24-13:8.

Jurors had also been aware from the outset that this was a major case that provoked intense community interest.[3] This was confirmed following their verdict in Phase II (compensatory damages), generally regarded as a loss for the plaintiffs. ER 65. The next morning, three dead salmon were left at the home of one juror. JTr. 195:6-18. The same malicious act occurred, twice more, at the home of Rita Wilson. JTr. 233:20-36:2. None of the incidents was

[3] The jurors were a "little upset" at the start of the trial when one juror passed around the room a copy of a newspaper identifying all the jurors and where they lived. JTr. 117:14-18:14, 167:14-21. As one said, "I live amongst fishermen and oil men down there, and you know [if] they don't like the verdict, you know, what am I opening myself up for?" JTr. 113:7-9.

233:20-36:2. None of the incidents was reported to the Court or counsel, but some, and perhaps all, of the jurors were aware of them. JTr. 75:17-23, 112:9-14, 161:5-25, 211:6-13, 234:4-11. The jurors viewed the dead salmon as messages from persons interested in the trial and unhappy with the outcome of Phase II. JTr. 75:13-76:4, 112:9-14, 233:20-23, 234:4-11, 235:14-36:2.

A major, controversial, and difficult case, and an untrained and irresponsible security officer with a penchant for interference in the jury's deliberations: these ingredients began to come together on Sept. 2, 1994 — Day Four of the punitive damages deliberations, the Friday before Labor Day, and the jurors' thirty-second day of deliberations. Mrs. Wilson, who had been holding out against an award of punitive damages, ER 359, was discovered outside the jury room "in some emotional distress," 45/7686:9-10, "obviously quite distraught," and "sobbing." 44/7679:17-18. The CSO on duty that day was Warrick, JTr. 266:7-19, and several of the other jurors observed him talking to Mrs. Wilson. JTr. 180:3-15, 197:9-16.

When the jurors returned from the Labor Day weekend, Warrick accosted Juror Doug Graham. As Graham testified, Warrick "kind of motioned for me to come over." JTr. 141:11-13. Graham "tried to beeline," but Warrick "motioned me over there." JTr. 141:14-18. Warrick "said something about ... you're really having problems with [Rita Wilson], or something like that." JTr. 141:17-23. Then Warrick "removed his firearm from his holster . . . with his right hand, opened up the cylinder and removed a bullet and held it out to him and stated something to the effect of 'putting Rita out of her misery,' or 'She needs to be put out of her misery.'" ER 276, 281-82, 318:22-19:8, 320:15-23; JTr. 141:23-25. Warrick "acted like he wanted me to take ahold of the bullet or something," which "just totally freaked me out" and "really shook me up." JTr. 142:1-9. Graham said later he had been "stunned." ER 276, 321:8-13. Gra-

ham told the jury foreman about the incident, ER 277, 322:19, and may have told other jurors. JTr. 142:3-4.

All this occurred at a critical point in the jury's deliberations. At 12:55 p.m. on Sept. 6, 1994, Judge Holland received a note from the jury stating that the jury had reached an impasse. ER 78. Judge Holland refused to accept the jury's statement that it was at an impasse, denied defendants' motion for mistrial, 45/7684:12-90:18, 46/7701:22-23, and ordered the jury to continue deliberating, 45/7688:15-90:13.

Just after deliberations for the day had ended – *after* Mrs. Wilson had already left the courthouse – the district court received another note from the remaining jurors. 46/7696:4-10. In the note, the remaining jurors advised the district court they had "one juror that we feel is emotionally unable to deliberate within the Jury instructions," and that "we have reached a crucial stage in our deliberation that has left us concerned about her emotional and physical health." ER 79; 46/7696:15-19.

The next morning, Judge Holland ascertained from the foreman that Mrs. Wilson was the hold-out juror, and called her in to meet with him and with counsel. 46/7694:11-13, 7695:25-96:6. Concerned about the potentially coercive effect of singling out one juror for questioning, defendants requested that other jurors be interviewed about any problems impeding deliberations. 46/7694:23-95:3. Judge Holland rejected this suggestion. 46/7695:7-11. While questioning Mrs. Wilson, Judge Holland revealed to her the note from the other jurors questioning her "emotional and physical health" and suggesting none too subtly that she should be dismissed from the jury. 46/7696:15-20. He also revealed to Mrs. Wilson that her husband had visited the court, without telling his wife, to express concern about the stress she was under, 46/7697:1-10 – a disclosure that "shocked" her. JTr. 63:25-64:1. Notwithstanding all of this, Mrs. Wilson told the district court that she wished to continue to serve because

she felt that she "ma[d]e a difference." 46/7698:1-18. The district court sent her back to deliberate. 46/7698:19-25.

The deliberations were extremely stressful. Mrs. Wilson soon sent out a note to the district court "in substance asking to be excused from the jury." JTr. 257:1-2. Without consulting further with counsel, Judge Holland had an ex parte meeting with a weeping Rita Wilson at the jury room door, and, according to his own account, told her "that I could do nothing further at this time beyond telling her to follow the Court's instructions." ER 80. Both Mrs. Wilson and the other jurors understood that the district court had now rejected her request to get off the jury. JTr. 64:5-6, 15-17, 100:7-10, 166:25-167:4, 198:14-17, 257:1-11.

Rita Wilson's husband later testified that, "[a]t that point she really felt trapped." JTr. 257:9. He further testified that she believed that she would be put in jail if she chose not to continue deliberating. JTr. 254:11-23. Mr. Wilson gave this testimony on June 14, 1995, when the district court called him in to testify in place of his wife. The district court twice rejected ExxonMobil's efforts to take testimony from Mrs. Wilson directly. ER 118, 134 & n.8. Nevertheless, when Mrs. Wilson was finally allowed to speak for herself, in March 1998, she made plain why she had felt trapped and threatened. Warrick was at the center of the trouble.

Mrs. Wilson reported that on at least three occasions after Judge Holland had declined to discharge her, Warrick threatened her. WTr. 33:11-34:4. First, she identified Warrick as the source of her belief, which her husband had already reported back in 1995, that she could be held in the jail downstairs in the court house. WTr. 7:18-8:1. Mrs. Wilson also testified that Warrick showed her his gun and a bullet, just as he had done with Juror Graham. WTr. 27:11-28:2; *see also* 8:24-9:3. Finally, Mrs. Wilson testified that Warrick had gone so far as to explicitly threaten her, telling her he "had a gun and he could make me go back in [the jury room] by gunpoint," WTr. 43:16-18, and that if she were

"shot, accidentally, with a throw-away gun on break . . . [she] wouldn't be able to prove who did it," WTr. 7:9-17; *see also* WTr. 28:5-13.

Mrs. Wilson testified that as a result of the threats made to her, she acquiesced in a $ 5 billion punitive damages verdict with which she did not agree. WTr. 38:14-16. When she realized what she had done, she attempted suicide: "I had planned on, when they polled the jury, saying no that wasn't my verdict. I was threatened in the hall with my daughters and I took two weeks to look at myself and realized I'd done the worst thing in the world, I'd lied in federal court. And I was the worst person on earth and so that led to my suicide attempt." WTr. 38:14-19; ER 97. More than three years after that, the memory of these events was still painful for Mrs. Wilson. During most of her testimony, she was sobbing and visibly upset.

2. *The Facts Come to Light*

Of the facts in the preceding section, none was known to ExxonMobil when the verdict was rendered except those that occurred in open court and in chambers when counsel were present. Everything else was discovered later. This section describes how.

Local Rule 83.1(g) of the District of Alaska rules forbids lawyers to contact jurors after a trial. But on January 22, 1995, the *Anchorage Daily News* published an extensive account of the jury deliberations. ER 87-101. For the first time, the article reported that dead salmon had been thrown on jurors' lawns, and also reported that matters the trial court had excluded from evidence because of their prejudicial value had nevertheless reached the jury. The article also revealed that Rita Wilson had been the lone holdout against the award of punitive damages, and that following the verdict she had attempted suicide in remorse at her vote. ER 94-95, 97. Based on this article, ExxonMobil asked the district court to conduct an evidentiary hearing on the issues raised. The district court granted the motion, ER 102, with the im-

portant exception that it refused to take testimony from Mrs. Wilson. ER 118.

On June 13 and 14, 1995, the district court took testimony from all the other jurors, as well as from Rita Wilson's husband. JTr. 1-282. The district court conducted the questioning, and severely restricted its scope. Nevertheless, part of the truth began to emerge. Juror Doug Graham testified that Warrick had pulled him aside while he was entering the court house:

> [H]e motioned me over there and he said — like I say, I can't specifically tell you when, but I think it might have been right after the incident when Rita went out into the whatever you call it, vestibule, or whatever out there, and said something about, you know, you guys, you're really having problems with her, or something like that, pulled his gun out, took a bullet it [sic] out and said maybe if you put her out of her misery or something. He acted like he wanted me to take ahold of the bullet or something, and I said, I got to go, and that just totally freaked me out.

JTr. 141:17-42:3. This was the first report of this incident; the *Anchorage Daily News* had not mentioned it. Summoned by the district court in response, Warrick committed a federal crime. Under oath, he categorically denied Graham's allegations: "It was not me. . . . I haven't heard anything so absurd in my life. Nothing like that ever came from me." JTr. 269:8, 270:18-71:2.

Rita Wilson's husband testified about the severe stress on his wife during the deliberations. He told the district court that "she really felt trapped" after the jurors' effort to get rid of her. JTr. 257:9. He said his wife feared she would be put in the jail downstairs in the court house and brought up to deliberate during the day. JTr. 254:11-23. And he added that he thought that her fears about "the jail downstairs" had come from remarks either by the district court or by a security guard. JTr. 240:22-41:9, 241:23-42:10, 253:21-54:18.

Six months later, on Feb. 19, 1996, the district court denied ExxonMobil's motion for a new trial. ER 159. Judge Holland found that Mrs. Wilson had not been coerced by any influence outside the jury room, and that the court's own ex parte instructions and contacts with her had had no coercive effect. ER 167-79. In a key finding he later came to regret, ER 353-54, Judge Holland accepted Warrick's perjured denial of the incident rather than the testimony of Juror Graham: "[T]he court is not convinced that the incident ever occurred." ER 179-80.

A chance event reopened these matters, eighteen months later. On August 11, 1997, ExxonMobil's Anchorage counsel received a letter from counsel for plaintiff in a lawsuit captioned *Shepard v. General Securities Service Corp.*, No. F96-061 CV (D. Alaska), then pending in the district court in Fairbanks. ER 201-16. Defendant was the security company that employed Warrick. Plaintiff was a female security officer whom Warrick had caused to be fired, and who was suing for wrongful termination and sex discrimination. *Id.* Plaintiff's counsel learned that the United States Marshals Service had investigated Warrick's misconduct in connection with the *Exxon Valdez* trial, that Warrick had been repeatedly placed under polygraph examination, that he had *admitted* the incident with Juror Graham, that he lost his job as a result, and that a report existed of the Marshals Service investigation.[4] ER 228-31, 238-44, 248. When counsel for the United States refused to produce this report in discovery, plaintiff's counsel wrote to ExxonMobil's counsel on the sensible assumption that since the investigation pertained to extraordinary misconduct in connection with the *Exxon Valdez* case, the Marshals Service would have given ExxonMobil's counsel a copy. ER 253-54.

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[4] The Marshals Service advised Warrick's supervisor that all copies of the report were maintained outside Alaska because the report was "potentially explosive" with "far reaching consequences if it got into the wrong hands." ER 248.

But of course ExxonMobil knew nothing of this. It was later revealed that the Marshals Service investigation had been conducted *with the knowledge and permission of Judge Holland*, ER 271:9-72:8, 273:5-13, 315:6-317:18, but neither Judge Holland nor the Marshals Service ever disclosed the existence, let alone the results, of the investigation to ExxonMobil.

ExxonMobil moved the district court for a new trial on the ground of newly discovered evidence, and its then-pending appeal was remanded to permit limited discovery on the motion. Discovery revealed that the Marshals Service had indeed carried out an investigation, in the fall of 1995. The investigators had interviewed four jurors and Warrick, and put Warrick and Graham under polygraph. ER 281-286, 296-98. Graham passed but Warrick failed. ER 297, 296. Confronted with the polygraph results, Warrick admitted the incident with Graham. ER 300-02. As a result, he was removed from his job on Dec. 8, 1995, at the direction of the United States Marshal. ER 229:20-30:8. He died a few months later, in April 1996. ER 217.

Discovery also shed light on the manner in which the investigation had been conducted. It began in June 1995, just after the district court took testimony from ten of the jurors. ER 270:5, 313:1-6, 314:8-25. Marshal Murphy paid a call on Judge Holland to tell him that the investigation was going forward. Judge Holland told Murphy "to do what you have to do," but, without explanation, instructed him *not* to report the results of any investigation back to the Court. ER 273:5-13. He also limited the scope of the investigation. When Senior Deputy Marshal Riffe remarked that he would like to interview every juror, Judge Holland advised that only three or four specified jurors (not including Rita Wilson) needed to be interviewed, and that he wanted a "very low-key" investigation. ER 316:10-317:13.

On Feb. 19, 1996, when the district court denied ExxonMobil's motion for new trial on the ground that the

incident with Juror Graham had not happened, the Marshals Service had known for two months that the incident *had* occurred, *and* that Warrick had perjured himself in the testimony on which the district court was relying. ER 300-02, 179-80. The district court's finding was thus contrary to facts the district court would have known but for its instruction to the Marshals Service not to advise the court of the results of the investigation.

But the full story was not yet known even when the Marshals Service investigation was finally disclosed in February 1998. The Marshals Service had never contacted Mrs. Wilson. ER 104:13-24. Accordingly, ExxonMobil moved the district court – a third time – to take her testimony. ER 259. This time, Judge Holland granted the motion. ER 263. The result was Rita Wilson's testimony set forth in the preceding section. Sobbing and upset, she revealed, at long last, what had actually happened.

B. District Court Ruling

After Mrs. Wilson's testimony, the parties filed supplemental briefs on ExxonMobil's motion for new trial. CD 7163. On July 31, 1998, the district court entered its Order No. 339, denying the motion. App. 24a. With respect to the incident involving Juror Graham, the court found that the incident had occurred, but that Graham had not been "coerced," and that the incident had not affected his deliberations. App. 32a.

The district court found that Mrs. Wilson was sincere and that she believed what she said. App. 42a. Judge Holland nevertheless disregarded *all* her testimony. He found that she had "unintentionally and mistakenly incorporated the incident between CSO Warrick and Graham into her own experience where it formed the basis for erroneous, recently regained memories of other incidents which did not happen." App. 41a. In making this finding, Judge Holland relied on his own *ipse dixit*, as there was no evidence (expert or otherwise) to support it. The Judge made *no* finding concerning

Mrs. Wilson's testimony that Warrick had told her she would be put in the jail downstairs in the court house if she did not continue to deliberate – indeed, he did not even mention it.

C. Court of Appeals Opinion

On appeal, the Ninth Circuit concluded that CSO Warrick's intrusions into the jury's deliberations – while concededly improper – did not justify a new trial on punitive damages. The court recognized that when it is established that "extraneous information" has been imparted to the jury, prejudice is presumed and the party defending the verdict bears the burden of proving that the information was not of a kind that that would have affected the reasonable juror. App. 8a. Applying a distinction unique to Ninth Circuit case law, however, the court further concluded that this case did not involve extraneous information, but instead a distinct species of outside influence on the jury – namely, "ex parte contacts." *Id.* Under Ninth Circuit precedent, such contacts are not considered to be so troublesome as extraneous information, and thus no presumption of prejudice arises from such contacts unless they are first determined to be "inherently coercive." App. 9a. The Court of Appeals agreed with the district court that the contacts were not "inherently coercive," and therefore imposed on ExxonMobil the burden of proving that CSO Warrick's improper intrusions had caused "actual prejudice" to ExxonMobil. Unsurprisingly given this standard, the court held that ExxonMobil was not entitled to a new trial. App. 9a-10a.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT REVIEW TO RESOLVE A SHARP DIVISION IN THE FEDERAL CIRCUITS OVER THE CONTINUED VALIDITY OF THE *MATTOX/REMMER* RULE

For more than a century this Court has recognized the proposition, fundamental to our adversarial system of justice, that any communications with the jury about a case other

than the presentations of the parties and the on-the-record instructions from court are "absolutely forbidden and invaldiate the verdict unless their harmlessness is made to appear." *United States v. Mattox*, 146 U.S. 140, 150 (1892). Because any external contact with the jury about the case – unintentional or not – presents a risk that the jury will not base its decision solely on the record and applicable law, proof of the existence of such contacts erects a presumption of prejudice, *Remmer v. United States*, 347 U.S. 227, 229 (1954), requiring that the party defending the verdict establish that the verdict was free from the taint of external influence. *Id.*[5]

Within the last two decades, however, several of the federal circuits have refused to apply the *Mattox/Remmer* presumption except in limited circumstances, and some have held that it no longer applies at all. As the Sixth Circuit has observed:

> Prior to 1982, it seems to have been the consistently applied rule that, upon exposure [of] a jury to a potentially prejudicial communication, it was the government's burden to prove that the jury had not been biased by the communication. Since *Smith v. Phillips*, 455 U.S. 209 (1982), however, there has been split among the federal circuits with respect to

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[5] *Mattox* and *Remmer* were criminal cases, but "because the integrity of the jury system is no less to be desired in civil cases," *Rinker v. County of Napa*, 724 F.2d 1352, 1354 (9th Cir. 1983), the federal circuits have uniformly applied common principles in criminal and civil cases alike. *See, e.g.*, App. 7a n.4 ; *Waldorf v. Shuta*, 3 F.3d 705, 712 (3d Cir. 1997); *Mayhue v. St. Francis Hosp. of Wichita, Inc.*, 969 F.2d 919, 922 (10th Cir. 1992); *Stephens v. South Atl. Canners*, 848 F.2d 484, 488-89 (4th Cir. 1988); *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984); *Krause v. Rhodes*, 570 F.2d 563 (6th Cir. 1977). In any event, this federal common-law punitive damages proceeding was an exercise of the federal government's authority to inflict punishment on its citizens – a proceeding to which heightened protections attach. *See Oberg*, 512 U.S. at 530-31.

> split among the federal circuits with respect to the burden of proof.

United States v. Walker, 1 F.3d 423, 431 (6th Cir. 1993). Other circuits also have acknowledged this division over whether subsequent decisions of this Court have abandoned or altered the *Mattox/Remmer* rule. *See, e.g., United States v. Angiulo*, 897 F.2d 1169, 1185 (1st Cir. 1990) (opinion of the court, joined by Breyer, C.J.) ("Although the government is careful to cite the two circuit court opinions that have accepted, in whole or in part, this abandonment theory, it neglects to cite to any of the many circuit opinions that resoundingly have rejected this abandonment theory." (citations omitted)); *United States v. Gartmon*, 146 F.3d 1015, 1028 (D.C. Cir. 1998) ("notwithstanding the view of the Sixth Circuit that *Remmer* is no longer controlling . . . many of our cases have continued to recognize the presumption of prejudice"); *United States v. Littlefield*, 752 F.2d 1429, 1431 (9th Cir. 1985) ("The *Phillips* case, contrary to the Sixth Circuit's analysis [in *United States v. Pennell*, 737 F.2d 521, 532-33 (6th Cir. 1984)], did not confront the issue of burden of proof but rather concerned the necessity for a hearing on the issue of juror partiality."); *United States v. Dutkel*, 192 F.3d 893, 896 (9th Cir. 1999) ("[W]e do not believe that any of the Supreme Court's intervening opinions have spoken to the special case of jury tampering and we must therefore disagree with [*United States v.*] *Sylvester*, [143 F.3d 923 (5th Cir. 1998)].").

The consequence of this disagreement is that in some courts of appeals – including the court below – the party victimized by an improper contact still bears the burden of proving *actual prejudice* from the external influence. This burden is made especially heavy by Federal Rule of Evidence 606(b)'s rule against inquiry into jurors' subjective thought processes. If – as happened here – courts conclude in the first instance that an improper contact was objectively *not* likely to influence the verdict, then it is all but impossible to show by objective evidence alone that the contact *did*

influence the verdict. Whether, and in what form, the *Mattox/Remmer* presumption applies is thus a question with serious consequences, and the division in the courts over the question necessarily means that the outcomes in like cases will vary with the circuit in which they arise. *See, e.g., Pennell*, 737 F.2d at 532 (affirming judgment but acknowledging that if "*Remmer* were controlling," judgment likely would be reversed). The Court should grant review to resolve this important conflict over the status of the *Mattox/Remmer* rule.

A. This Court's Precedents Regarding Review Of Verdicts Possibly Prejudiced By Improper External Influences

As context for our description of the split in lower court authority, we begin by briefly recounting this Court's own relevant precedents.

This Court first squarely addressed the question at issue in *Mattox v. United States*, 146 U.S. 140 (1892). In that case – a federal criminal prosecution – jurors had overheard a bailiff commenting on the defendant's past criminal record, and a newspaper account of the case lauding the government's closing argument had been left in the jury room. *Id.* at 142-43. The trial court refused to consider juror affidavits describing these facts on the ground that juror testimony impeaching the verdict was inadmissible. This Court reversed, holding that even though jurors may not offer evidence as to their state of mind or reasons for reaching the verdict, they may submit objective evidence as to "overt acts" of external influence that may have occurred. *Id.* at 148-49. Turning to the question whether the affidavits in that case were "material" evidence of prejudice, the Court answered with an unequivocal yes:

> Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, unless their harmlessness is made to appear.

Id. at 149.

The Court next addressed the problem of improper external influences in *Remmer v. United States*, 347 U.S. 227 (1954), and *Remmer v. United States*, 350 U.S. 377 (1956) (*Remmer II*). In that case - another federal prosecution - a juror had been approached by a third party about the case, and the FBI had conducted an inquiry into the matter, including an interview with the juror during the trial. The lower court refused to conduct a hearing into the defendant's assertion of prejudice resulting from the contacts. This Court reversed and ordered a hearing, observing:

> In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

Remmer, 347 U.S. at 229. On remand, the trial court found no prejudice, and this Court *again* reversed, this time reviewing the entire factual record and concluding that the contacts were of such a kind that the juror involved was necessarily prejudiced. *Remmer II*, 350 U.S. at 377.

The Court returned to the issue in a state case arising on habeas, *Parker v. Gladden*, 385 U.S. 363 (1966). Like *Mattox*, *Parker* involved an inappropriate comment by the bailiff overheard by several jurors. The federal court granted a writ of habeas corpus, and this Court affirmed. The bailiff's comments, the Court held, deprived defendant of his constitutional rights to trial by an impartial jury and to cross-examine witnesses against him. 385 U.S. at 364.

The next two cases were also habeas cases. In the first, *Smith v. Phillips*, 455 U.S. 209 (1982), it was discovered after trial that during trial a juror had submitted an application for employment with the office of the district attorney that was prosecuting the defendant. The state courts refused to grant a new trial, but the federal district court, while finding insufficient evidence that the juror was actually biased, held that bias was conclusively "implied" under the circumstances, and granted the writ. This Court reversed that judgment, rejecting the claim that bias must be implied even where no actual prejudice had been shown. Rather than adopt the doctrine of implied bias as a "conclusive presumption" in some cases as urged by concurring and dissenting Justices, *see Phillips*, 455 U.S. at 209 (O'Connor, J., concurring); *id.* at 232 (Marshall, J., dissenting), the majority held that because the Constitution requires only that the defendant be afforded a fair and impartial jury and trial procedures, *see id.* at 217, habeas relief may not be granted so long as the state court ensured that no actual prejudice occurred: "This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Id.* at 215 (citing *Remmer*). The Court did not, however, say anything about whether a defendant could make such proof by way of a rebuttable evidentiary presumption in the defendant's favor.[6]

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[6] It is not clear, in any event, that the Court *could* have required such a presumption in *Phillips*, which arose on habeas review of a state-court proceeding. As the *Phillips* Court observed, "[f]ederal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension. No such wrongs occurred here." *Phillips*, 455 U.S. at 221; *see also Dickerson v. United States*, No. 99-5525, slip op. at 8 (June 26, 2000) ("With respect to proceedings in state courts, our authority is limited to enforcing the commands of the United States Constitution." (internal quotation marks omitted)). The *Mattox/Remmer* presumption of prejudice, in other words, may not be in and of itself a constitutional command, but instead a rule of evidentiary procedure prescribed by this Court on direct review of federal cases to protect the underlying constitutional right, which is the

The next case, *Rushen v. Spain*, 464 U.S. 114 (1983), is to the same effect. In that case, a state trial judge had failed a communication with a juror about a concern the juror raised during trial. The lower federal courts had granted habeas relief on the simple ground that "an unrecorded ex parte communication between trial judge and juror can never be harmless error." *Id.* at 117. This Court rejected that view in a short, per curiam opinion, holding consistent with *Phillips* that the "prejudicial effect of a failure to [disclose a judge/juror communication] . . . can normally be determined by a post-trial hearing." *Id.* at 119. Like *Phillips*, *Rushen* is silent with respect to any presumption applicable in that hearing.

The final relevant case is *United States v. Olano*, 507 U.S. 725 (1993), which involved the presence of an alternate juror in the jury room during deliberations in violation of Fed. R. Crim. P. 24(c). The defendant argued that such an "intrusion" into the jury required automatic reversal, but the Court held the error was subject to harmless-error review for its prejudicial effect on the verdict: "We generally have analyzed outside intrusions upon the jury for prejudicial impact." *Id.* at 738 (citing *Remmer* and other cases). While suggesting that some types of intrusion might be so severe or problematic as to warrant a *conclusive* presumption of prejudice, *id.* at 739-40, the Court concluded that a *Remmer* hearing would be appropriate for resolving most questions of prejudice. *Id.* The Court did not speak at all to the question whether a *rebuttable* presumption applies in such cases, and if so under what circumstances.

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right to a fair and impartial jury. It is notable that in the earlier habeas case *Parker v. Gladden*, the Court did not discuss a presumption of prejudice, but instead ordered habeas relief because of the violation of the underlying constitutional right.

B. The Division In The Federal Circuits Over The Continuing Validity And Applicability Of The *Mattox/Remmer* Presumption of Prejudice

There is a fundamental disagreement in the federal circuit courts of appeals over the question whether *Phillips*, *Rushen*, and *Olano* affected the continuing validity of the *Mattox/Remmer* presumption. The Sixth Circuit has concluded that the presumption has been abandoned altogether. In direct conflict with the Sixth Circuit, the First, Seventh, Tenth and Eleventh Circuits have held that the presumption must be applied in every case involving evidence of an external influence on the jury. Most of the other circuits, including the court below, have taken a middle ground, reading *Phillips* and the other decisions to retreat from or modify the presumption in various and conflicting ways. We discuss the divergent approaches circuit-by-circuit.

First Circuit: The First Circuit follows the *Mattox/Remmer* presumption faithfully:

> *[A]ny* unauthorized communication between any person who is associated with the case, or who has an interest in the outcome of the case, and a juror would have the potential for being prejudicial. The court would then need to conduct sufficient inquiry to determine whether the communication was harmless.

United States v. O'Brien, 972 F.2d 12, 14 (1st Cir. 1992) (emphasis added); *see also United States v. Gaston-Brito*, 64 F.3d 11, 13 (1st Cir. 1995) (same).[7]

Second Circuit: The Second Circuit also continues to apply the presumption in all cases. *See United States v. Wiley*, 846 F.2d 150, 157 (2d Cir. 1988); *United States v.*

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[7] A panel opinion issued shortly after *Angiulo* suggested that the *Remmer* presumption arises only where there are "significant" or "aggravated" ex parte juror contacts, *United States v. Boylan*, 898 F.2d 230, 261 (1st Cir. 1990), but the court declined to so limit *Remmer* in its later decisions in *O'Brien* and *Gaston-Brito*.

Weiss, 752 F.2d 777, 782-83 (2d Cir. 1985). *Cf. Bibbins v. Dalsheim*, 21 F.3d 13, 16 (2d Cir. 1994) (presumption applies on "direct review of federal convictions," but more limited rule applies in habeas proceedings).

Third Circuit: The Third Circuit applies a modified version of the *Mattox/Remmer* rule. In contrast to the Fifth and Sixth Circuits, the Third Circuit explicitly held in *United States v. Console*, 13 F.3d 641 (3d Cir. 1993), that *Phillips* "did not reject *Remmer*'s presumption of prejudice," distinguishing *Phillips* on the ground that it "did not involve a third-party communication with a juror regarding the matter pending before the jury." *Id.* at 666. The court also distinguished earlier Third Circuit decisions refusing to apply any presumption of prejudice, *e.g.*, *United States v. Gilsenan*, 949 F.2d 90 (3d Cir. 1991); *Waldorf v. Shuta*, 3 F.3d 705, 710 (3d Cir. 1993), on the ground that those cases involved media publicity and not direct third-party contacts with jurors, *see Console*, 13 F.3d at 666. In cases involving media publicity, the court explained, a presumption of prejudice arises only when the publicity is "aggravated." *Id.* The court did not explain the logic underlying a "media publicity" exception to *Remmer*, and no other Circuit recognizes it.

Fourth Circuit: The Fourth Circuit has also modified the *Mattox/Remmer* presumption, though slightly, applying it only to cases in which the party challenging the verdict makes a threshold showing that the ex parte contact was "more than innocuous." *Stephens v. South Atlantic Canners*, 848 F.2d 484, 488-89 (4th Cir. 1988). If that minimal showing is made, the presumption of prejudice arises, and the other party must establish that there is "no reasonable possibility that the jury's verdict was influenced by an improper communication." *Id.*; *see Howard v. Moore*, 131 F.3d 399, 422 (4th Cir. 1997); *United States v. Cheek*, 94 F.3d 136, 141 (4th Cir. 1996).

Fifth Circuit: In direct conflict with the First, Second, Seventh, Tenth, and Eleventh Circuits, the Fifth Circuit has

held that "the *Remmer* presumption cannot survive *Phillips* and *Olano*." *United States v. Sylvester*, 143 F.3d 923 (5th Cir. 1998). Unlike the Sixth Circuit, on the other hand, the Fifth has not rejected the *Remmer* presumption in all cases; its view is that the presumption "is not triggered automatically but [is] imposed at the discretion of the district court," *id.* at 933, where the party challenging the verdict first shows that prejudice is a "likely" result of particular improper contacts. *Id.* at 934.

Sixth Circuit: The Sixth Circuit has rejected *Remmer* explicitly. *See United States v. Pennell*, 737 F.2d 521, 532-33 (6th Cir. 1984). Focusing on the statement in *Phillips* that "[t]his Court has long held that the remedy for allegations of juror partiality is a hearing in which *the defendant has the opportunity to prove actual bias*," *Phillips*, 455 U.S. at 215 (emphasis added), the Sixth Circuit concluded that *Phillips* puts the burden on the defendant in all cases "to demonstrate that unauthorized communications with jurors resulted in actual juror partiality. Prejudice is not to be presumed." *Pennell*, 737 F.2d at 532. *See also United States v. Zelinka*, 862 F.2d 92, 95-96 (6th Cir. 1988); *United States v. Howard*, 752 F.2d 220, 223-24 (6th Cir. 1985).

In a strong dissent in *Pennell*, Judge Celebrezze argued that the statement in *Phillips* regarding the defendant's opportunity to prove bias at a hearing said nothing at all about whether the defendant could prove such bias *by way of a presumption*, as the *Remmer* Court had held: "Under *Remmer*, a defendant has the burden of establishing that the unauthorized juror contact was prejudicial; the defendant is *aided* by a presumption that prejudice did arise from unauthorized juror contact. In the absence of evidence to the contrary, a presumption operates to invalidate any verdict." *Pennell*, 737 F.2d at 539 (Celebrezze, J., dissenting). *Phillips*, Judge Celebrezze correctly pointed out, was simply "another case which rejects the use of a *conclusive* presumption of prejudice under circumstances which are not extreme." *Id.* at 539-40.

Seventh Circuit: The Seventh Circuit applies the *Mattox/Remmer* presumption in all extraneous juror influence cases. *See Schaff v. Snyder*, 190 F.3d 513, 533 (7th Cir. 1999); *Owen v. Duckworth*, 727 F.2d 643, 646 (7th Cir. 1984).

Eighth Circuit: The Eighth Circuit follows a *Mattox/Remmer* regime that is perhaps second only to that of the Ninth Circuit in terms of doctrinal confusion. In the Eighth Circuit, courts will presume prejudice from an ex parte jury contact, but only where the contact "relates to *factual* matters at issue in the case." *United States v. Estrada*, 45 F.3d 1215, 1226 (8th Cir. 1995) (emphasis added). "When an extrinsic contact relates to *legal* issues, the presumption of prejudice does not apply." *United States v. Blumeyer*, 62 F.3d 1013, 1017 (8th Cir. 1995) (emphasis added); *see Estrada*, 45 F.3d at 1226 (no presumption where jury "is exposed to extraneous information merely supplementing the Court's legal instructions"); *see also United States v. Cheyenne*, 855 F.2d 566, 568 (8th Cir. 1988). In *Blumeyer*, the Eighth Circuit applied this rule to affirm a criminal conviction despite evidence that the jury foreman contacted an outside attorney with a question of law during deliberations. 62 F.3d at 1016-17.

None of the Eighth Circuit opinions identifies a source in this Court's precedents for the dichotomy between extraneous factual information and extraneous legal information, nor has any other Circuit adopted that distinction.

Ninth Circuit: The opinion below reveals some – but not all – of the Ninth Circuit's schizophrenia on the *Mattox/Remmer* presumption.

The Ninth Circuit initially applied a full *Mattox/Remmer* presumption, explicitly rejecting the Sixth Circuit's conclusion that *Phillips* had effectively overruled *Remmer*. *See United States v. Littlefield*, 752 F.2d 1429, 1431 (9th Cir. 1985). Subsequent opinions retreated from *Littlefield* without overruling it; as the opinion below explains, Ninth Cir-

cuit precedents now "distinguish between introduction of 'extraneous evidence' to the jury, and *ex parte* contacts with a juror that do not include the imparting of any information that might bear on the case." App. 7a. In cases involving extraneous information, the presumption of prejudice applies. *Id.* at 8a; *see United States v. Maree*, 934 F.2d 196, 201 (9th Cir. 1991). But where there is "only" improper external influence on the jury's deliberations, as in this case, there is generally no presumption and the aggrieved party must prove that "actual prejudice" resulted from the influence. App. 8a; *see United States v. Madrid*, 842 F.2d 1990, 1091-93 (9th Cir. 1988). A rebuttable presumption *may* arise in a case involving an improper non-information external influence, but only where the influence has *already* shown to be "inherently coercive." App. 9a.

On top of all this, the Ninth Circuit has added the rule that when "tampering" is involved, the *Mattox/Remmer* presumption still applies automatically, *United States v. Dutkel*, 192 F.3d 893, 896 (9th Cir. 1999) – even though tampering does not involve "extraneous information" and may not be "inherently coercive."

None of this Court's precedents, of course, distinguish between external contacts involving information related to the case and other kinds of external influences. Indeed, *Remmer* itself involved an intrusion into a juror's deliberations – an FBI interview of a juror – that was *not* evidence or information about the case. Nor do this Court's cases limit the presumption to intentional jury tampering. It would be surprising if the Ninth Circuit's balkanized *Mattox/Remmer* regime were the correct one – certainly no other Circuit has followed the Ninth in this area – but if so, it is all the more reason for this Court to grant review and make that clear.

Tenth Circuit: The Tenth Circuit follows *Mattox* and *Remmer* without qualification: "The law in the Tenth Circuit is clear. A rebuttable presumption of prejudice arises *whenever* a jury is exposed to external information in contraven-

tion of a district court's instructions." *Mayhue v. St. Francis Hosp., Inc.*, 969 F.2d 919, 922 (10th Cir. 1992) (emphasis added); *see United States v. Aguirre*, 108 F.3d 1284, 1288 (10th Cir. 1997) ("It is well-settled that a jury's exposure to extrinsic information gives rise to a rebuttable of prejudice."); *United States v. Scisum*, 32 F.3d 1470, 1482 (10th Cir. 1994) (*Remmer* "applies to every non-public non-record communication with a juror at any point in a criminal case"); *United States v. Hornung*, 848 F.2d 1040, 1044-45 (10th Cir. 1988).[8]

Eleventh Circuit: The Eleventh Circuit also applies the *Remmer* presumption: "[P]rejudice is presumed the moment the defendant establishes that extrinsic contact in fact occurred." *United States v. Martinez*, 14 F.3d 543, 550 (11th Cir. 1994); *see United States v. Pessefall*, 27 F.3d 511, 515 (11th Cir. 1994); *United States v. Caporale*, 806 F.2d 1487, 1503 (11th Cir. 1986).[9]

D.C. Circuit: Mirroring the general confusion among the circuits, cases within the D.C. Circuit currently reflect an intramural conflict on this question, as discussed in *United States v. Gartmon*, 146 F.3d 1015, 1028 (D.C. Cir. 1998). On the one hand, *Gartmon* observes, cases like *United States v. Butler*, 822 F.2d 1191, 1195-96 & n.2 (D.C. Cir. 1987); *United States v. Fafowara*, 865 F.2d 360, 363 (D.C. Cir. 1989); and *United States v. Williams*, 822 F.2d 1174, 1188 (D.C. Cir. 1987), all "continued to recognize the presump-

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[8] In one isolated case, the court suggested that the presumption arises only for "certain types of extraneous information," *United States v. Simpson*, 950 F.2d 1519, 1522 (10th Cir. 1991), but the opinion did not define the limitation, and both earlier and later cases make clear that the Circuit recognizes no such limitation.

[9] One early Eleventh Circuit panel did hold that "prejudice is not presumed" and that the defendant "has the burden of demonstrating prejudice by a preponderance of credible evidence." *United States v. Rowe*, 906 F.2d 654, 657 (11th Cir. 1990). But *Martinez* expressly declined to follow *Rowe*, *see Martinez*, 14 F.3d at 550 n.3, and the court's later opinion in *Pessefall* follows *Martinez* rather than *Rowe*.

tion of prejudice and to place the burden of disproving it on the government." *Gartmon*, 146 F.3d at 1028. On the other hand, *Gartmon* continues, the court in *United States v. Williams-Davis*, 90 F.3d 490 (D.C. Cir. 1996), had "questioned the continued breadth of *Remmer*," *Gartmon*, 146 F.3d at 1028, and "suggested that the cases no longer treat the presumption as 'particularly forceful,'" *id.* (quoting *Williams-Davis*, 90 F.3d at 496). With the last word on the subject, the *Gartmon* Court left the intracircuit conflict to fester. *See id.* (concluding that on facts of the case the court "need not resolve this debate, or the tension in our own cases").

C. This Case Demonstrates That The Circuit Conflict Over The Validity And Applicability Of The *Mattox/Remmer* Presumption Has Significant Consequences For Litigants' Rights To A Fair And Impartial Jury

The sheer number of federal circuit court opinions cited in this petition – which is by no means exhaustive – shows that the question of how to treat the *Mattox/Remmer* presumption is an important one that continues to vex the courts on a widespread and continuing basis. And it is clear that each circuit's resolution of this problem makes a substantive difference in individual cases. Indeed, in the leading circuit court opinion rejecting *Remmer*, the Sixth Circuit explicitly acknowledged that the use of the presumption likely would have made a dispositive difference in the outcome of the appeal. *Pennell*, 737 F.2d at 532. While it is obviously impossible to say that in every case, it is necessarily so in a substantial number, because of the effect of the longstanding rule – now codified in Fed. R. Evid. 606(b) – that while jurors may testify as to objective events that could have had an effect on their deliberations, they may *not* give evidence as to the actual, subjective effect of those events on their deliberations.

The Ninth Circuit's rule, as applied to the facts of this case, perfectly illustrates the problem. Assuming that

Mattox and *Remmer* remain good law, it is clear that CSO Warrick's concededly improper contacts with the jury should have created a strong presumption of prejudice, and required a new trial of the punitive damages issues in the absence of a showing (not made here) that there was no reasonable possibility that the jury was *not* prejudiced. When Warrick brandished a firearm, handed Juror Graham a bullet, and suggested that Mrs. Wilson should be put "out of her misery," the unmistakable import of his comments was that Warrick was not on Mrs. Wilson's "side" in the jury's deliberations; that Mrs. Wilson, not the other jurors, was the "problem"; and that the other jurors had legitimate reason to be unhappy about Mrs. Wilson. That message is not neutral. Any reasonable juror would take away from it the message that a court officer was expressing an opinion on the deliberations, and in particular that the court officer thought Mrs. Wilson was in the wrong. The objective effect of Warrick's conduct can only have been to delegitimize – indeed demean – Mrs. Wilson's views, to diminish her influence with the jury, and to push the jury in the direction of a verdict contrary to Mrs. Wilson's views.[10] That is precisely the kind of unbalanced interference with the jury's deliberative process that this Court's cases universally forbid. *Parker*, 385 U.S. at 365; *Remmer II*, 350 U.S. at 382. Clearly the risk that the communication was "possibly prejudicial," *Mattox*, 146 U.S. at 149, was at least as great here as the ambiguous, unresolved FBI interview at issue in *Remmer*. And the flagrant misconduct here simply bears no relation to the trivial or casual

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[10] Thus the Ninth Circuit's suggestion that Graham took Warrick's remarks as "a tasteless joke," App. 4a, is entirely beside the point: even assuming it *was* a joke, the only point of the joke was that *Mrs. Wilson was the one causing trouble.* Thus, whether Warrick was "joking" or not, the message conveyed to any reasonable juror is exactly the same, and necessarily prejudicial. In any event, Graham *never* said he though Warrick's comment was a "joke." Rather he said that it "totally freaked me out," "really shook me up," and "threw me for a loop," or that he was "stunned." *Supra* at 7.

contacts that were held non-prejudicial in *Phillips* or *Rushen* or *Olano*.

But in the Ninth Circuit, no presumption of prejudice arises in a non-tampering ex parte contact case unless the court *first* decides for itself that the contact is "inherently coercive." App. 9a. If not, then the party challenging the verdict may prevail only by proving "actual prejudice" from the contacts. *Id.* The Catch-22 is obvious: because of Rule 606(b), the party may only prove prejudice by showing that the contact was coercive as an objective matter, but of course the court in rejecting the presumption has already concluded that the contact was *not* coercive as an objective matter. So it was here. Because the court concluded that Warrick's conduct did not "inherently coerce" the jury, the court did not afford ExxonMobil the benefit of the *Mattox/Remmer* presumption – even though by any standard the communication was "possibly prejudicial" and thus well within the *Mattox/Remmer* rule.

This case shows why a litigant in the Ninth Circuit (and certainly in the Fifth and Sixth) is much less likely than one in the First, Second, Seventh, Tenth or Eleventh to be able to prove that his or her right to a fair and impartial jury was adversely affected even by concededly improper – or, as in this case, frankly outrageous – intrusions into the jury's deliberations. Had this case arisen in the latter circuits, ExxonMobil would have received the benefit of the presumption, and respondents would have been required to establish that, in light of all the objective facts and circumstances of the case, there was no "reasonable possibility" that that the jury was prejudiced by Warrick's conduct. *United States v. Sanders*, 962 F.2d 660, 668 (7th Cir. 1992) (internal quotation marks omitted).[11]

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[11] It is worth noting in this regard that the *Mattox/Remmer* rule need not present the same unfair Catch-22 for a party defending a possibly tainted verdict as the Ninth Circuit's rule does for a party challenging one. Properly applied, the rule does not mean that the presumption of

But what truly matters for purposes of these jurisdictional papers is that even if *Smith*, *Rushen*, and/or *Olano* are read – incorrectly, in our view – as having undercut the fundamental principles of *Mattox* and *Remmer*, until the earlier cases are overruled by this Court the federal circuit courts are required to continue to apply them where, as here, they are directly applicable. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997). And the undeniable fact is that only some federal circuits continue to adhere to those cases, while others do not. This case, then, is a classic one for the exercise of this Court's certiorari jurisdiction: the decision of the Ninth and other Circuits not only "conflict[s] with the decision[s] of [other] United States court[s] of appeals on the same important matter," S. Ct. R. 10(a), but at the same time the Ninth and other Circuits have also "decided an important federal question in a way that conflicts with relevant decisions of this Court." *Id.* 10(c).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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prejudice will be impossible to rebut in every case. As the Second and Seventh Circuits have recognized explicitly, the "quantum of proof" necessary to rebut the presumption depends on the nature of the contact in question. *Evans v. Young*, 854 F.2d 1081, 1083 (7th Cir. 1988); *see Weiss*, 752 F.2d at 783. When the presumption applies, it may still be rebutted if the trial court concludes, after reviewing all the objective facts and circumstances of the case – such as the nature of the contact, the length of the jury's exposure to it, the relationship of the contact to the issues in the case, and the strength of the parties' cases, *see Blumeyer*, 62 F.3d at 1017; *Mayhue*, 969 F.2d at 923-24; *Bayromoglu v. Estelle*, 806 F.2d 880, 887 (9th Cir. 1986) – that the party defending the verdict has shown that there is no "reasonable possibility that the verdict was affected by the contact," *Sanders*, 962 F.2d at 668 (internal quotation marks omitted).

Respectfully submitted,

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Dated: July 14, 2000

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SEA HAWK SEAFOODS, INC.; COOK INLET PROCESSORS, INC.; SAGAYA CORP.; WILLIAM MCMURREN; PATRICK L. MCMURREN; WILLIAM W. KING; GEORGE C. NORRIS; HUNTER CRANZ; RICHARD FEENSTRA; WILDERNESS SAILING SAFARIS; SEAFOOD SAILS; RAPID SYSTEMS PACIFIC LTD., *Plaintiffs-Appellees,*

v.

ALYESKA PIPELINE SERVICE CO.; EXXON CORPORATION; EXXON SHIPPING COMPANY, *Defendants,*

and

JOSEPH HAZELWOOD, *Defendant-Appellant.*

SEA HAWK SEAFOODS, INC.; COOK INLET PROCESSORS, INC.; SAGAYA CORP.; WILLIAM MCMURREN; PATRICK L. MCMURREN; WILLIAM W. KING; GEORGE C. NORRIS; HUNTER CRANZ; RICHARD FEENSTRA; WILDERNESS SAILING SAFARIS; SEAFOOD SAILS; RAPID SYSTEMS PACIFIC LTD., *Plaintiffs-Appellees,*

v.

EXXON CORPORATION; EXXON SHIPPING COMPANY, *Defendants-Appellants,*

and

ALYESKA PIPELINE SERVICE COMPANY, *Defendant.*

In re: THE EXXON VALDEZ,

SEA HAWK SEAFOODS, INC.; COOK INLET PROCESSORS, INC.; SAGAYA CORP.; WILLIAM MCMURREN; PATRICK L. MCMURREN; WILLIAM W. KING; GEORGE C. NORRIS; HUNTER CRANZ; RICHARD FEENSTRA; WILDERNESS SAILING SAFARIS; SEAFOOD SAILS; RAPID SYSTEMS PACIFIC LTD., *Plaintiffs-Appellees,*

v.

EXXON CORPORATION; EXXON SHIPPING COMPANY, *Defendants-Appellants,*

and

ALYESKA PIPELINE SERVICE COMPANY, *Defendant.*

Nos. 98-35796, 98-35807, 98-36087, & 98-36117.

Appeals from the United States District Court
for the District of Alaska
H. Russell Holland, Chief District Judge Presiding.
D.C. No. CV-89-00096-HRH
Argued and Submitted
May 3, 1999
Filed March 16, 2000

Before: James R. Browning, Charles Wiggins,[1]
and Andrew J. Kleinfeld, Circuit Judges.

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[1] The Honorable Judge Charles E. Wiggins, who was a member of the panel, died on March 2, 2000. He had concurred in this opinion before his death.

OPINION

KLEINFELD, Circuit Judge:

This is one of several appeals before this panel relating to the *Exxon Valdez* oil spill litigation. the subject of this appeal is whether the$5 billion punitive damages verdict against Exxon, and the $5,000 punitive damages award against Hazelwood, should be set aside because of irregularities during jury deliberations. We affirm the district order that it should not. This decision goes only to the motion to vacate the judgment for irregularities during jury deliberations. It does not purport to decide the issue of the amount of damages, compensatory and punitive, awards to the plaintiffs.

I. Facts

This case was tried in three separate phases. the phase with which this appeal is concerned was the punitive damages determination. After the jury awarded $5 billion, defendants filed numerous motions, and appealed from the judgment and from denial of its motion for new trial. While that appeal was pending, newly discovered evidence persuaded the district judge, and us, that remand was appropriate, under *Crateo, Inc. v. Intermark, Inc.*,[2] for consideration in the trial court. We remanded for consideration of the Rule 60(b)(2) motion for relief from judgment based on the newly discovered evidence. This appeal concerns only the second motion for new trial, based on the newly discovered evidence, not the first motion for new trial, so we do not discuss the facts and legal determination raised in the earlier motion. Captain Hazelwood, who piloted the *Exxon Valdez* in the accident, appeals, but simply joins in the arguments by Exxon Corporation and Exxon Shipping Company, so we describe the appellants collectively as "Exxon."

A retired police officer from Florida served as a Court

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[2] *Crateo, Inc. v. Intermark, Inc.*, 536 F.2d 862, 869 (9th Cir. 1976).

Security Officer during the trial and deliberations. He was experienced and much decorated, as a police officer and before that in the military. He acted as one of the bailiffs, maintaining security for the jury room, escorting the jury, attending to its requests for food and other needs, and receiving its communications. The punitive damages phase of the trial took more than four months, so all the participants had considerable contact with each other.

An Anchorage newspaper published a story after the trial describing the extremely stressful summer in the jury room.[3] One of the jurors, Juror A, was especially distressed and was not getting along well with the rest of the jury. That had been obvious to all participants, because she cried in the hall and otherwise acted distressed, and because the jury sent out notes expressing concern about her mental condition. Based on some of the allegations in the article, the district court held an evidentiary hearing in which the jurors were questioned by the judge under oath in open court with counsel present about possible irregularities.

One juror, Juror B, testified that the bailiff motioned him aside as he came to deliberations one morning and "said something about, you know, you guys, you're really having problems wit her, or something like that, pulled his gun out, took a bullet out and said maybe if you put her out of her misery or something." Juror B said he might have told the jury foreman about it, but told no one else, and "it really shook me up." Juror B perceived the remark as a tasteless joke rather than as a threat or serious suggestion. The bailiff testified under oath that "I haven't heard anything so absurd in my life. Nothing like that ever came from me." The district judge ruled that "the court is not convinced that the incident ever occurred," but that if it did, it did not warrant a new trial, because Juror A never learned of the communication, and Juror B and the jury foreman did not understand it

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[3] *See The $5 Billion Jury*, Anchorage Daily News, Jan. 22, 1996, at A1.

to be a threat directed at them.

The United States Marshall in Anchorage, John R. Murphy, directed the investigation of the alleged incident. Juror B passed a lie detector examination, and the bailiff's lie detector examination "indicated deception" in the opinion of the polygraph examiner, investigator Robert Sheldon. Sheldon later confronted the bailiff about aspects of his interrogation that appeared contradictor. the bailiff then admitted that the bullet incident occurred as Juror B described it, but that he "was joking" and that "nothing was meant to be . . . a threat or intimidation." Marshal Murphy told the bailiff that because he had lied, the Marshals Service would pursue terminating him unless he resigned. The bailiff turned in a written resignation within five minutes. Marshall Murphy did not tell the district judge or the lawyers that Juror B had been telling the truth and that the bailiff had lied. The bailiff died of a heart attack a few months after being forced to resign, prior to adjudication of the second motion to vacate the judgment. At the time the district court denied Exxon's motion, partly on the basis of believing the bailiff's false testimony, all these events had already transpired, and the Marshal knew the bailiff was lying and that the gun incident had occurred. But the judge did not.

Exxon's lawyers did not know anything about the Marshal's investigation of and report on the bailiff. It was secret. but a lawyer in Fairbanks happened to be representing a woman there is a wrongful termination casein which the bailiff figured, and he had done discovery that disclosed the existence (but not the contents) of the report. He wrote Exxon's lawyers, assuming they knew more than he did, and saying that he had found out in discovery that a supervisor of the bailiff had written in his notes that the report was "potentially explosive" but claimed not to recall why, and the United States Attorney's office objected to disclosing the report or to deposing Marshals Service personnel about it. He hoped to obtain a copy of it from Exxon's lawyers, not realizing that he knew much more about it (such as that it

existed) than they did.

After following up on this tip, Exxon filed a second motion for new trial. Though the gun incident described above brought about the motion, Exxon claims that additional incidents also entitle it to relief. In addition to the remark and display of the gun to Juror B, the bailiff had had other contracts wit the jurors that Exxon claims entitle it to a new trial. Also, Juror A testified that when she asked the bailiff what would happen if she simply refused to come t the courthouse and deliberate any more, he told her that she could be arrested and put in jail. Also, she testified that one of the other jurors made a remark to her which she understood as a threat to harm her daughters if she did not say that she agreed with the verdict when the jury was polled.

ANALYSIS

A. The bailiff's gun remark

Exxon argues that the bailiff's remark to Juror B, in the context of other contacts that it argues were inappropriate for a bailiff, entitles it to have the $5 billion punitive damages verdict vacated and a new trial ordered.

The district judge held extensive evidentiary proceedings, and made extensive findings of act in support of its denial of the motion for new trail. On the second motion, after the bailiff had been forced to resign for lying, the court found that the incident occurred as Juror B had described it. The district court characterized the bailiff's "maybe if you put her out of her misery" remark as "potentially coercive," but noted that the "potential coercion was not directed at Juror [B]." The juror toward whom the remark might be potentially coercive was Juror A, but she did not know about it during the deliberations and verdict. The juror to whom the remark was made, Juror B, and the jury foreman, to whom Juror B may have repeated it, were not the objects of any coerciveness. The district court expressly found that "Juror [B] was not coerced by the incident and that, with the possible exception of the jury foreman, the other jurors did not learn

of the incident during the time they deliberated." Based on these factual findings, the district court concluded that the bailiff's "maybe if you put her out of her misery" remark and display of the gun, though potentially coercive, was not in fact coercive conduct.

The district court therefore treated the bailiff's remark and conduct as an inappropriate *ex parte* contact rather than coercion. The court concluded that "Exxon has not shown prejudice or that the incident between [the bailiff] the Juror B affected the verdict." Based on Exxon's failure to show actual prejudice, the district court concluded that a new trial was not warranted on this ground.

There was testimony that the bailiff had dropped by a Fourth of July picnic the jurors had. Some jurors thought he should not have been there, though the juror who hosted the picnic apparently invited him. Also, while on a weekend drive in the neighborhood of one of the jurors, Juror C, the bailiff and his wife dropped by the house of Juror C, and his wife. Juror C was a gold miner, and lived in a rural area an hour or two out of Anchorage. The two couples had coffee and chatted about guns, but not about anything trial related. The district judge found that the bailiff attended the fourth of July picnic and had social encounters with Juror C. the court found that these contacts were "not coercive in nature or effect." The district court concluded that because the contacts were no coercive, the burden was on Exxon to show prejudice, and it had not.

Our precedents distinguish between introduction of "extraneous evidence" to the jury, and *ex parte* contacts with a juror that do not include the imparting of any information that might bear on the case. Our precedents are mostly in criminal cases, but we have applied the same rules in civil cases.[4] Were extraneous information is imparted, as when

[4] *See Rinker v. County of Napa*, 724 F.2d 1352, 1354 (9th Cir. 1983) (stating that reliance on criminal cases is appropriate because the "integrity of the jury system is no less to be desired in civil cases." (quoting *United States v. Barfield*, 359 F.2d 120, 124 (5th Cir. 1966)).

papers bearing on the facts get into the jury room without having been admitted as exhibits, or when a juror looks things up in a dictionary or directory, the burden is generally on the party opposing a new trial to demonstrate the absence of prejudice, and a new trial is ordinarily granted if there is a reasonable possibility that the material could have affected the verdict.[5]

But this is not an extraneous information case. The bailiff did not tell Juror B anything about the facts or the law. He made a strikingly tasteless joke about Juror A, arising out of her conspicuous emotionality, departure from the jury room, and crying. "Where ex parte contacts are involved, the defendant will receive a new trial only if the court finds 'actual prejudice' to the defendant."[6] This standard applies to *ex parte* contacts when, as compared to extraneous information, they do not pertain to " 'any fact in controversy or any law applicable to the case.'"[7] The contact by the bailiff here was *ex parte* in the same sense the clerk's contact with a crying juror was in *Madrid*. Both cases involve an inappropriate response by court staff to emotion and bickering in the jury room, where the staff contact did not involve any communication bearing on the substantive matters before the jury.[8] The heightened standard for motions for new trial, burden on the movant to show actual prejudice, therefore applies to the bailiff's contact. Our review, where, as here, the district judge has held an evidentiary hearing, is marked by "special deference to the trial judge's impression of the impact of the evidence."[9]

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[5] *See United States v. Maree*, 934 F.2d 196, 200-01 (9th Cir. 1991); *see also United States v. Madrid*, 842 F.2d 1092, 1093 (9th Cir. 1988).

[6] *Maree*, 934 F.2d at 201 (citing *Madrid*, 842 F.2d at 1093).

[7] *See id.*

[8] *Madrid*, 842 F.2d at 1091.

[9] *United States v. Plunk*, 153 F.3d 1011, 1024 (9th Cir. 1998).

While an *ex* parte remark may in come circumstances merit a rebuttable presumption of prejudice because of its inherently coercive effect, as where a judge instructs a juror exparte regarding the verdict,[10] the bailiff's tasteless joke did not merit ay such presumption. It did not purport to tell the individual to whom it was directed, Juror B. what his decision in the case ought to be or how he should make it. The bailiff was not telling him he should shoot Juror A, and Juror B did not understand the remark to mean that. the district judge made a finding of fact that "[Juror B] treated this encounter as a bad joke." We defer to this finding of fact as our precedents require.[11]

Exxon argues for application of the standard, more liberal toward grants of new trial, for juror coercion and extrinsic evidence. However, as *Madrid* illustrates, the problem of court personnel making inappropriate remarks to deal with crying jurors who are not getting along with their fellow jurors arises from time to time, and is ordinarily dealt with as an *ex parte* contact case, under the standard requiring the movant to demonstrate actual prejudice.[12]

Exxon has not cited any precedent for applying the extrinsic evidence or coercion standard to an *ex parte* contact case such as this one. these *ex parte* contact cases use a different standard from extrinsic evidence and coercion cases both because *ex parte* contacts are less likely to do any harm to the deliberative process than extrinsic information or coercion, and also because such contacts are very hard to avoid. "[I]t is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote."[13] Long trials are especially vulnerable to *exparte* con-

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[10] *Cf. United States v. United States Gypsum*, 438 U.S. 422, 462 (1978); *Jenkins v. United States*, 380 U.S. 445, 446 (1965).

[11] *See Valley Eng'rs, Inc. v Electric Eng'g Co.*, 158 F.3d 1051, 1052 (9th Cir. 1998), cert. denied 119 S. Ct. 1455 (1998).

[12] *See Madrid*, 84 F.2d at 1091.

[13] *Rushen v. Spain*, 464 U.S. 114, 118 (1983).

tacts, because people around the courthouse get to know the jurors, and it becomes much harder for jurors and others to preserve an artificial social isolation as days stretch into weeks. Publicity creates a shower of *ex parte* contacts on the jurors. They become celebrity magnets to aspiring "inside dopesters," and also because ordinarily social people are naturally inclined to make small talk about what they heard in the news. Except in large cities, at least some jurors in long trials are reasonably likely to see the judge, witnesses, court personnel, and lawyers at school events, concerts, sporting events, or the grocery store, where social contact is hard to avoid. In a long, high publicity case, a new trial on account of *ex parte* contacts is likely to be no more pure than the first trial. Retrial of a publicized case introduces the additional distortion that jurors in the retrial are likely to have trouble distinguishing what they heard from the publicity after the first trial from what they heard in the courtroom in the second.

Exxon also argues that the district court, in the course of finding that the "maybe if you put her out of her misery" remark was taken as a "bad joke," violated the rule against inquiring into the effect of a statement during deliberations on a juror's state of mind.[14] The rule does not apply. It is limited to effects on the juror's state of mind "as influencing the juror to assent to or dissent from the verdict,"[15] or "concerning the juror's mental processes in connection therewith."[16] Juror B's testimony was not about his mental processes in connection with the verdict. He was asked what he understood the bailiff's words to mean, that is, whether they were a bad joke or a serious suggestion that he shoot Juror A. that had no bearing at all on whether Exxon should pay punitive damages and how much it should pay. *Rushen* establishes that "[a] juror may testify concerning any mental bias in mat-

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[14] Fed. R. Evid. Rule 606(b).

[15] *Id.*

[16] *Id.*

ters unrelated to the specific issues that the juror was called upon to decide and whether extraneous prejudicial information was improperly brought to the juror's attention," even though the rule prohibits a juror from testifying "about the mental process by which the verdict was arrived."[17] Likewise, in *Madrid* we considered the juror's statement that she "did not think" that the court clerk was trying to influence her verdict, when the clerk found her crying after another juror had sworn at her, and told her she should settle her differences with that juror.[18]

The bailiff certainly should not have made his tasteless joke to Juror B. However, after careful review of the extensive evidentiary record and scrutiny of the district court's findings, we conclude that the district court correctly categorized the bailiff's conduct and words as an inappropriate *ex parte* contact with a juror that did not introduce extraneous information into the deliberations and was not, in context, actually coercive. Our precedents therefore require that in order to obtain a new trial on account of it, Exxon would have to demonstrate actual prejudice. It did not.

B. The bailiff's alleged threats to Juror A

Exxon also argues that it is entitled to a new trial because of newly discovered evidence that the bailiff coerced Juror A. Its theory is that the bailiff threatened both to kill her and also to lock her in jail if she refused to deliberate further. during the extensive evidentiary proceedings on the first motion for new trial, she had made no such allegations. Her emotionally distraught condition had been apparent to the judge and other court personnel, because she ran out of the jury room crying more than once, and her husband had come to court to talk to the judge about how upset she was. But she had not made her accusations of coercion by the bailiff until after the newspaper publicity about denial of the first

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[17] *Rushen*, 464 U.S. at 121 n.5.

[18] *See Madrid*, 842 F.2d at 1092.

motion for new trial, that she did not ever tell him that the bailiff or any other court employee had made any communication to her that she considered inappropriate. He testified that she told him the guards outside the jury room tried to "calm her down" and "console her" "with hugs and words." regarding jail, Juror A's husband testified that his wife felt "penned up" as "everybody does" in a jury, and that "if she chose not to come back, that they would put her in the jail downstairs and bring her up to deliberation during the day," but he did not testify as to who she said told her that. The judge had not required Juror A to testify on the first motion because of her ill health, and Juror's A's husband expressed appreciation for that.

When the second motion for a new trial was made, Juror A was required to testify. Her testimony was strikingly different from anything that had been heard before. According to what she said in 1998, three and a half years after the trial, she knew about the bailiff's display of the gun when it happened, because the other jurors told her "[t]hat I was wanted dead." Two of the jurors did not tell her that, but the other nine and also the bailiff "were very creative at telling me how I could be killed." Asked what the bailiff said when he told her he wanted her dead, Juror A gave this response:

> [One juror] could have a heart attack; it would be my fault. [The jury foreman] could start smoking and that would be my fault. I could be shot, accidentally, with a throw-away gun on break and wouldn't be able to prove who did it. Or one of the jurors could just accidentally get in the deliberation room with a gun. One day I was very upset and one of my things was just to walk in the little room outside the deliberation room and [the bailiff] told me that he could kill me and no one would know . . . and the other jurors would back him up.

Asked if the bailiff ever took a bullet of his gun and showed it to her, Juror A gave this response:

> He loaded his gun, yeah . . . . I don't know anything about guns, and he just had this bullet and he put it in and asked me – I don't remember. Oh, we just – two weeks of terror and I don't know what day it was, but it was something about Russian roulette or something. That's the only time I saw the bullet.

Juror A, during this same line of questioning, gave this description of the threat to put her in jail:

> I asked him if I just didn't show up one day what they would do. He said they would arrest me and there was a jail downstairs and I could spend nights in the jail and they would bring me up for deliberation, and it wouldn't solve anything in my life, because home was the only thing that was saving my sanity.

She testified that eight other jurors "most definitely" wanted her dead.

- One, who scared her by "throwing things at me," threatened to rape her, suggesting that rape "would straighten me up." This juror, as the jurors were lined up to reenter the courtroom and deliver their verdict, also made what Juror A took to be a threat against her daughters, discussed in the next section: "he told me that my daughters were very good-looking and to think about that when I gave my vote."
- Another was "big on killing me" by smuggling a knife into the jury room in a cup of ice, and "cutting my body up and flushing it down the toilet."
- Another, who "was slimy, acting like he was on the take," "told me how to commit suicide."
- Another suggested that the first would "make me come to my senses" through the use of murder or violence.

- Another "had a vacation, that was the most important thing. If it meant killing me, fine. She had a real important vacation."
- There were also various "comments about shooting me."

According to the Juror A, once it started, the open discussion of how to kill her came up every day in the jury room.

Juror A testified that she did not tell her husband or anyone else about the death threats from the bailiff and the others at the time. The she forgot about them, and had no recollection of the bailiff displaying the gun or bullet until her husband told her that the incident with Juror B had been reported in the newspaper. After her husband told her about the story in the newspaper about the display of the gun and bullet to Juror B, then "things started coming back." Juror A kept a personal journal during the trial, but she did not mention the bailiff's threat to kill her or any of the other death threats in the journal. She also talked to numerous journalists, but did not tell any of them about it. She claimed to receive numerous written death threats, but did not save any of them or show any of them to anyone. Juror A subsequently attempted suicide, and was under medical care at the time of her testimony. She attributed her suicide attempt to delivering a verdict that was not her true verdict, because of the threat to her daughters.

Exxon's argument focuses upon the alleged threats by the bailiff, not on the alleged threats by the other jurors, so the restrictions on upsetting a verdict because of what went on in the jury room have no application. There was no objection to the testimony about what went on in the jury room, and it is summarized above because it bears on the credibility determination the district judge made.

The district judge was present when Juror A testified. He had arranged an informal setting for her testimony, a deposi-

tion in a lawyer's office with himself and one lawyer for each side present, instead of testimony in court with all the many lawyers involved, in order to provide her with a less stressful environment. He did not believe that the incidents she described involving the bailiff – the gun display, the Russian roulette comment, the threat to put her in jail – had actually happened. The judge was now well aware that the bailiff could not be assumed to have acted properly. And the bailiff had died of a heart attack shortly after being required to resign, so he could not contradict Juror A's account, which she had not remembered while he was alive.

The district judge nevertheless concluded, applying a pre-ponderance of evidence standard, that the events Juror A now described had not actually occurred. He found that Juror A was telling what she believed to be the truth and not lying, but that what she described as a new memory was actually a false memory stimulated by the newspaper account of the bailiff's contact with Juror B, and mediated through her own high level of emotion:

> [Juror A] more probably than not did not learn of the bullet incident involving [the bailiff] and Juror [B] during the time the jury was deliberating. Rather, the court finds that she learned of this incident later, more probably than not as a result of publicity following the court's denial of Exxon's first motion for a new trial .... The Court finds that [Juror A] has unintentionally and mistakenly incorporated the incident between [the bailiff] and Juror [B] into her own experience where it formed the basis for erroneous, recently regained memories of other incidents which did not happen.

As a result, the court explicitly found that "[Juror A] did not have any inappropriate, threatening, or coercive encounter with [the bailiff] during jury deliberations," and concluded that Juror A "was not the subject of coercive conduct or other impermissible communications from [the bail-

iff] . . . during jury deliberations."

The district judge gave extensive reasons for his conclusion. Among them were these:

- He had extensive opportunities, during the trial and deliberations, and during the deposition, to observe Juror A's demeanor, and it showed an emotional condition not consistent with reliability of her report. At the deposition, where she had no personal stake *unlike a litigant in court), and was questioned by a lawyer with a gentle, soft manner, she began trembling the fist minute, and within ten minutes "her entire body was trembling" and she was crying, yet unlike most stressed witnesses in court, she had no trouble speaking and "appeared oblivious to the violent trembling of her limbs and copious weeping." There was "no objective reason for [Juror A] to be fearful or emotional," and her "severe trembling and copious weeping was a wholly inappropriate response to the circumstances" and "cast substantial doubt upon the reliability of what she has said."
- Her testimony about the bailiff and also about what the other jurors said and did was "bizarre and shocking."
- According to the other jurors, Juror A had never mentioned being threatened by the bailiff.
- Juror A's husband testified that Juror A had never told him of any communications with "anyone associated with the court" that she deemed to be inappropriate. In fact, Juror A's husband stated that Juror A often received consoling "hugs and words" from the bailiffs immediately outside the jury deliberation room.
- As he personally observed them during delibera-

tions, "other jurors appear to have been concerned for Juror A's emotional well-being" during deliberations.

- Juror A kept a journal during the deliberations, yet "[n]one of the incidents which she now recalls and attributes to [bailiff] are mentioned in the contemporaneous journal."

The district judge was acutely aware that, the last time he had disbelieved a story about highly inappropriate conduct by the bailiff, he had been mistaken. He said that his own words in his previous finding "have now come back to haunt this judge," and in his order expressly addressed his "own embarrassment over learning that the 'bullet incident' between [the bailiff] and Juror [B] in fact occurred." But he was not prepared simply to assume that any accusation of any similar incident was true, without careful examination of the evidence, because "[t]hat would be unfair to the plaintiffs and to the ten other jurors."

Exxon argues that the district judge should have believed at least part of what Juror A said the bailiff had done, and part is enough to obtain a new trial. Because the district court held extensive evidentiary hearings and made findings of fact, we review the findings of fact to determine whether they are "clearly erroneous."[19]

Exxon argues that Juror A's testimony "is validated first and foremost by Juror A's attempted suicide." We do not see why. The suicide attempt can just as reasonably be interpreted as an indictor of extreme emotional distress or de-

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[19] *See US v. Hanley*, 190 F.3d 1017, 1031 (9th Cir. 1999) ("We review the district court's denial of a motion for a new trial on the asserted ground of juror misconduct for an abuse of discretion. '[A]lthough we review alleged incidents of juror misconduct independently, we must accord special deference to the trial judge's impression of the impact' of the alleged misconduct. We review the district court's credibility determinations and findings of historical fact for clear error." (internal citations omitted)).

pression that might distort the individual's ability to perceive and remember social occurrences accurately. Exxon argues that something must have happened to precipitate Juror A's emotional distress during the deliberations. but we know that an entirely innocent, highly stressful event occurred that would cause emotional distress – two weeks of intense jury deliberations in an important case.

Exxon argues that Juror A's emotional response was proof of the truth of what she was saying." Again, we do not understand why. "Inappropriate affect" is a term any judge has heard many times from psychiatric witness testifying to an emotional disorder, such as depression, which would more likely distort an individual's perceptions and memories of social interactions than validate them. Exxon says that "[t]he district court simply did not get it," because the emotions would naturally flow form Juror A's distress about having been threatened with death, but that assumes what is to be proved, that she was in fact threatened with death. Juror A's explanation of why she had not brought up any of the death threats before, "I'd forgotten," would raise serious doubts in any rational finder of fact about whether she had a normally functioning memory.

Exxon argues that the district judge engaged in "judicial psychologizing" that he "was patently unqualified to perform," when he attributed Juror A's testimony to a false memory, because such analysis can only be performed by experts. Exxon cites cases in support of its argument,[20] but they are not on point. They hold that a district court erred in not allowing a defendant to put psychiatric evidence before he jury to show that he suffered from a mental defect that would cause him to make a false confession,[21] that a plaintiff

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[20] *United States v. Hall*, 93 F.3d 1337 (7th Cir. 1996); *United States v. Shay*, 57 F.3d 126 (1st Cir. 1995); *Claar v. Burlington Northern R. co.*, 29 F.3d 499 (9th Cir. 1994); *Franklin v. Shelton*, 250 F.2d 92 (10th Cir. 1957).

[21] *See Hall*, 93 F.3d at 1344-45; *Shay*, 57 F.3d at 133.

needed some expert witness evidence to show causation between certain physical conditions and claimed chemical exposure,[22] and that a mother bringing a negligence claim was not competent to testify as to her child's internal injuries due to a car accident.[23]

The "judicial psychologizing" argument lacks merit. Any judge or juror assigned the task of deciding whether a juror's account of facts is true must necessarily consider the juror's ability accurately to perceive, remember and relate those facts. Where the judge or juror has good reason to think that the account of the facts is false, yet the witness has no apparent reason to lie, the finder of fact necessarily must think about why the witness might give a false account while attempting to tell the truth. Juror A's account was, as the district judge noted, so unlikely as to be highly implausible. Far from being inappropriate "amateur psychologizing" as Exxon contends, the district judge's careful analysis focused on factors that juries are routinely instructed to consider: "the witness' memory"; "the witness' manner while testifying"; "whether other evidence contradicted the witness' testimony"; "the reasonableness of the witness' testimony in light of all the evidence"; and "any other factors that bear on believability."[24]

Exxon argues that we must reverse because the district judge did not explicitly and separately discuss Juror A's allegation that the bailiff threatened her with jail if she refused to come to court and deliberate. This part of her account did not suffer from the implausibility of the rest of it, because court-houses ordinarily have holding cells for prisoners, and it may be that there are circumstances where a recalcitrant juror could be brought in and held pursuant to a bench war-

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[22] *See Claar*, F.3d at 104.

[23] *See Franklin*, 250 F.2d at 97.

[24] Ninth Circuit Manual of Model Jury Instructions, Civil, Form 3.7 (1997).

rant.[25] But the district judge did not have this allegation in isolation. Juror A testified that the bailiff made this threat in the conversation where he threatened to kill her, and testified to it in the series of answers where she described all the lurid ways she could be killed.

It is logical to disbelieve even a plausible allegation if a witness makes it in the course of a generally implausible account. Suppose, hypothetically, a person says "I saw a woman milking a cow." That is plausible. Now suppose the persons goes on to say "and the woman and cow were inside a horse's head, and there was another woman who was walking upside down on the roof of an upside down house." In light of these additional statements, it is not sensible to say, as Exxon's arguments implies, "well, she must have seen something, and a woman milking a cow is plausible, so she must have at least seen a woman milking a cow." It is far more probable that the person in not describing anything that happened in the empirical actuality of which findings of acts are made, and instead saw all this in a Marc Chagall painting (or if the hypothetical speaker is Marc Chagall, in his imagination). Juror A was not describing a Chagall painting, but she described events so unlikely, with a demeanor so extreme, that a finder of fact could reasonably conclude that she suffered from a condition that would distort her perceptions or recollections. The district judge so concluded. If a person claims to have perceived things which almost certainly did not occur, then it is reasonable to disbelieve the person's claim to have perceived things that might otherwise reasonably be thought to have occurred. The district judge did not accept the truth of anything Juror A said, because of the extreme unlikelihood of much of what she said, as well as her demeanor while saying it. We routinely instruct jurors that they "may believe everything a witness says, or part of

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[25] *See generally* 28 U.S.C. § 1866(g) (1994) (providing that juror who fails to appear pursuant to summons for jury duty and fails to show cause for failing to appear "may be fined not more than $100 or *imprisoned not more than three days, or both.*" (emphasis added)).

it, or none if it,"[26] and a judge has the same choices, for the same reasons. The district judge rejected all of Juror A's testimony, including her account of the bailiff's threat to put her in jail if she refused to come to court and deliberate. His finding was not clearly erroneous.

Exxon also argues that the district court's instructions did not adequately emphasize each juror's duty to maintain her own honest convictions rather than yield them to reach a verdict, and each juror's duty to maintain courtesy toward the other jurors. This argument could be and was made only in Exxon's first motion for new trial, not the second motion for new trial, the denial of which is the only issue before us. The second motion is based on "newly discovered evidence" under Rule 60(b)(2).[27] The judge's instructions to the jury were of course not "newly discovered evidence" years after the trial had concluded. They are therefore not before us for review. We do not intimate the judge's instructions fell outside the discretion the district court had to formulate instructions.[28]

Exxon argues that Juror A's account of the bailiff's alleged threat to put her in jail and bring her upstairs for deliberations was corroborated by her husband's testimony. It would not be decisive if it was, but in fact it was not. What he said was that his wife felt "penned up,", as jurors typically do during lengthy deliberations. He also said that "her impression" was that "if she chose not to come back, they could pt her in the jail downstairs and bring her up to deliberation during the day." he did not testify that she said the bailiff had told her this. The impression could as easily have come

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[26] Ninth Circuit Manual of Model Jury Instructions, Civil, 3.7 (West 1997).

[27] Fed. R. Civ. Pro. Rule 60(b).

[28] *See Gilbrook v. City of Westminster*, 177 F.3d 839, 860 (9th Cir. 1999) ("Because the district court has substantial latitude in tailoring jury instructions, we review the formulation of those instructions for an abuse of discretion.").

from a juror or some other acquaintance who had been on a state jury where the same question was raised, and an answer along those lines had been given. Jurors sometimes learn a lot from accounts by others of jury service in other cases.

In sum, the district Judge described the focus of his findings as being on whether Juror A had been "threatened" or "intimidated" by the bailiff. That included the alleged threat to hold her in jail if she refused to show up. He held extensive evidentiary hearings, made careful findings of fact, and found that Juror A's account, in its entirety, did not merit belief, despite its subjective honesty. These findings were not clearly erroneous.

C. Juror C's Alleged Threat

Exxon argues that the district judge was required to grant a new trial because of a threat after the jurors had reached their verdict but before they returned it in open court. When the jurors have a verdict, they typically tell the bailiff. After the judge causes the parties, counsel and others to assemble in the court, the bailiff informs the jurors, and they line up awaiting his signal to walk into the courtroom. Once in court, the verdict is handed to the bailiff or deputy clerk, who passed it to the judge to inspect for defects of form, such as illegibility or not being signed by the foreman. Assuming that there are no defects of form, the judge has the deputy clerk read the verdict out loud. Many judges, with or without a request by counsel, then have the clerk poll the jury. That means that the deputy clerk asks each of them in open court whether the verdict as read is that juror's true and correct verdict. Only after each juror says that it is, does the judge accept the verdict and direct that it be entered.[29]

If a juror says "no" during the polling in open court, then the verdict is not entered. There may be a motion for mistrial, and the judge may decide whether to discharge the jury

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[29] *See 1 Kevin F. O'Malley et al, Federal Jury Practice and Instructions,* § 9.07 (5th ed. 2000).

and declare a mistrial, or order the jury to deliberate further.[30] Juror A testified that she planned to say "no" when the jury was polled, because she recognized that as a moment when a juror enjoys a high degree of physical safety. But she was scared to do so because the jurors lined up to enter the courtroom, Juror C "told me that my daughters were very good-looking and to think about that when I gave my vote." She understood that remark to be a threat directed at her daughters.

Exxon argues that the rule against allowing a juror to impeach her own verdict[31] does not apply because the alleged remark was made after the jurors had concluded their deliberations. We need not determine whether its legal argument has any merit, a doubtful proposition,[32] because the district judge made a finding of fact, as discussed above, that Juror A's account was not worthy of belief. this finding was not clearly erroneous, so the alleged threat must be treated as imaginary.

CONCLUSION

The district court's denial of Exxon's Rule 60(b)(2) motion based on irregularities in jury deliberations is AFFIRMED.

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30 *See id.*

31 Fed. R. Evid. Rule 606(b).

32 *See Traver v. Meshriy*, 627 F.2d 934, 941 (9th Cir. 1980).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re the EXXON VALDEZ	)	
	)	No. A89-0095-CV (HRH)
This Order Relates to All Cases	)	

ORDER NO. 339
Exxon's Second Motion for New Trial
(Coercion of Juror)

The Exxon defendants[1] (hereinafter Exxon) have moved pursuant to Rule 60(b)(2), Federal Rules of Civil Procedure, for a new trial as to Phase I (liability for punitive damages) and Phase III (amount of punitive damages).[2] In keeping with this court's standing orders for procedural matters in this case, Exxon sought and obtained leave for the filing of this motion.[3] Because this case was already on appeal to the Ninth Circuit Court of Appeals, the motion sought approval of an application to that court for a remand in order that the motion for new trial might be considered. The court indicated its willingness to receive a remand, and, on January 16, 1998, the court received and filed the order of the court of appeals granting the parties' joint motion for a limited re-

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[1] Exxon Corporation (D-1) and Exxon Shipping Company (D-2).

[2] Clerk's Docket No. 7124. This motion was filed with the clerk of court on September 23, 1997, covered by a motion to lift stay on motion practice. Clerk's Docket No. 7116. The motion to lift stay was subsequently granted. Clerk's Docket No. 7123. Joseph Hazelwood (D-07) has joined in the motion. Clerk's Docket Nos. 7117, 7160.

[3] Order No. 335 (Oct. 9, 1997), Clerk's Docket No. 7123.

mand.[4]

Also included within Exxon's motion was a request for limited, discovery. That request was granted.[5] In earlier proceedings (which are discussed below) and as a part of Exxon's first motion for a new trial, the court conducted a hearing at which the court, with input from counsel, interviewed ten of the eleven jurors who heard Phase III of the trial of this case, the husband of the eleventh juror, a court security officer, and a deputy clerk of court.[6] Because of concerns for the health of Rita Wilson, the eleventh juror, she was not interviewed.[7] (Mrs. Wilson had experienced a blood pressure problem during closing arguments and had become very emotional during Phase III deliberations.) As a consequence of information obtained by Exxon through discovery allowed in aid of this second motion for new trial, Exxon moved for leave to depose Mrs. Wilson.[8] The court granted leave to depose her.[9]

To complete the procedural development of this motion, and as approved by the court, supplemental memoranda summing up the positions of the parties with respect to Exxon's second motion for new trial have been filed.[10]

Background

Trial of Phase I of the Exxon Valdez litigation commenced on May 2, 1994. Verdicts were returned by the trial

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[4] Clerk's Docket No. 7131.

[5] Order No. 326 (Jan. 23 , 1998) , Clerk's Docket No. 7132 .

[6] Transcript of Sealed Hearing (June 13, 1995), Ex.13 attached to Clerk's Docket No. 7164.

[7] Order No. 296 (Aug. 17, 1995), Clerk's Docket No. 6435.

[8] Clerk's Docket No. 7144.

[9] Order No. 337 (Mar. 5, 1998), Clerk's Docket No. 7146.

[10] Exxon's supplemental memorandum is at Clerk's Docket No. 7163, plaintiffs' response is at Clerk's Docket No. 7164, and Exxon's reply is at Clerk's Docket No. 7167.

jury as to Phase I (liability for punitive damages) on June 13, 1994,[11] as to Phase II (compensatory damages) on August 11, 1994,[12] and as to Phase III (the amount of punitive damages) on September 16, 1994.[13] As to Phase II, the trial jury deliberated for 23 days; as to Phase III, the trial jury deliberated for 14 days. Because of the manner in which the trial was conducted and the form of the jury verdicts rendered, there was some considerable delay in the formulation of a final judgment which was not entered until September 24, 1996.[14]

On September 6, 1995, Exxon filed its first motion for a new trial pursuant to Rule 60(b)(2) as to Phases I and III (liability for and the amount of punitive damages).[15] Pertinent to what is now before the court, this initial motion for new trial raised issues of improper contact with jurors by Court Security Officer (CSO) Warrick.[16] After reviewing the circumstances concerning a communication between Juror Graham and CSO Warrick, and using words which have now come back to haunt this judge, it was said: "The court is not convinced that the incident [between Juror Graham and the CSO] ever occurred."[17] Hedging a bit, the court went on to conclude that: "If the incident took place as Juror Graham testified, then the CSO exercised incredibly poor judgment, but such foolishness would not warrant a new trial."[18] Exxon's motion for a new trial was denied.[19]

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[11] Clerk's Docket No. 5314.

[12] Clerk's Docket No. 5714.

[13] Clerk's Docket No. 5889.

[14] Clerk's Docket No. 6911.

[15] Clerk's Docket No. 6448.

[16] Order No. 308 (Feb. 20, 1996) at 9-23, Clerk's Docket No. 6638.

[17] Id. at 21-22.

[18] Id. at 23 (footnote omitted).

[19] Id. at 25.

It is against the foregoing background that the court received and considered Exxon's second motion for new trial. In its initial submission, Exxon made a prima facie showing that the incident between Juror Graham and CSO Warrick had indeed occurred. The United States Marshals Service had independently investigated the accusation that CSO Warrick had improperly contacted a juror. Both Warrick and Graham took a polygraph test. Ultimately Warrick confessed that the incident had taken place much as Juror Graham had described it.[20] CSO Warrick was terminated and subsequently died of natural causes.

In light of this development, and because Mrs. Wilson was the focus of the CSO's conversation with Juror Graham, the court became persuaded that she was the juror most likely to have been affected by the communication with Juror Graham if it had been communicated to her.[21] Accordingly, and as set out above, the court authorized a deposition of Mrs. Wilson. By agreement of the parties, Mrs. Wilson was examined by a single attorney for each side. The deposition was conducted in the presence of the court, but in the conference room of counsel for plaintiffs. Mrs. Wilson was accompanied by her husband and her counsellor. The transcript of Mrs. Wilson's deposition has been filed with the court under seal.[22]

Timeliness of Motion

Exxon's motion for a new trial is made pursuant to Rule 60(b)(2), Federal Rules of Civil Procedure. The rule provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the

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[20] The details of this incident were set out and discussed by the court in order No. 308 (Feb. 20, 1996) at 2I-23.

[21] Order No. 337 at 2 (Mar. 5, 1998), Clerk's Docket No. 7146.

[22] Clerk's Docket No. 7155.

> following reasons: ... (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b) .... The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

Fed. R. Civ. P. 60(b).

Plaintiffs raise the issue of the timeliness of Exxon's motion for new trial and in so doing concede, as the plaintiffs must, that the request for leave to file the instant motion was filed on the 364th day following the entry of judgment. The motion itself was timely presented. The somewhat obscure but potentially significant point as regards timeliness which the plaintiffs make is that the newly discovered evidence known to Exxon in September of 1997, upon which the instant motion is founded, was simply that the incident involving Juror Graham and the CSO occurred much as the juror contended. The details of the marshal's investigation and Mrs. Wilson's testimony all came much later and were not known by Exxon until more than a year after judgment.

Rule 60(b)(2) plainly says that one must discover new evidence and act upon it by filing an appropriate motion within a year from the entry of judgment. If a party discovers new evidence which might justify seeking a new trial more than a year after the entry of judgment, the discovery is too late. Here we have a situation which the rule and, so far as the court is aware, the text writers do not address: May a party who has timely moved for a new trial on the basis of newly discovered evidence offer further support for that motion by way of additional new evidence which was not discovered until after one year subsequent to the entry of judgment?

Plaintiffs rely upon Nevitt v. United States, 886 F.2d 1187 (9th Cir. 1989), for the proposition that the one-year period established by Rule 60 (b) is jurisdictional and not

subject to tolling. In Nevitt, and presumably here, the pendency of an appeal does not toll the one-year period. Nevitt, 886 F.2d at 1188. Nevitt, however, simply does not reach the question now before this court.

The court concludes that it has jurisdiction to entertain and decide on the merits Exxon's second motion for new trial. That motion was filed within one year from the entry of judgment, and the court has reacquired jurisdiction otherwise lost to the Ninth Circuit Court of Appeals by order of the latter court. Exxon made a prima facie showing that Order No. 337 was based in part upon the perjured testimony of a CSO. The court was requested to permit – and, in the exercise of its discretion, did permit – Exxon to undertake specific, limited discovery in furtherance of the second motion for new trial. That limited discovery led to a further motion to depose Rita Wilson which the court granted. The court concludes that Exxon is entitled to employ all of the newly discovered evidence, both that coming to their attention prior to filing their second motion for new trial, as well as that developed with court approval in subsequent proceedings on the motion for new trial.

The second motion for new trial was timely filed, and neither Rule 60(b)(2) nor any other authority called to the court's attention would foreclose the court from permitting Exxon a reasonable opportunity to further develop newly discovered evidence of substance which came to Exxon's attention prior to the one-year limitation period.

Rule 60(b) (2) Analysis

In deciding a motion based upon Rule 60 (b) (2) filed in the context of potential jury coercion, the court must undertake a two-part analysis. First, the court determines whether an evidentiary hearing-is required. United States v. Madrid, 842 F.2d 1090, 1094 (9th Cir. 1988). This aspect of the case is not in dispute. There being a reasonable possibility of prejudice to the defendants, the court permitted the parties to inquire extensively of the trial jury in connection with the

first motion for new trial and, as discussed above, granted Exxon's request for the development of new evidence of potential misconduct involving trial jurors. Neither plaintiffs nor Exxon has requested any further hearings. The hearing portion of the two-part analysis has been concluded.

The parties disagree as to the second step of the Rule 60(b)(2) analysis. Defendant contends on the basis of Remmer v. United States, 347 U.S. 227, 229-30 (1954), that contacts between court officers and jurors pertaining to the case are "presumptively prejudicial" and invalidate the verdict if harmful. Plaintiffs, on the other hand, assert that Exxon must show actual prejudice as a result of the conduct, 842 F.2d at 1093, and 'that the outcome would have been different." Hard v. Burlington Northern R.R., 870 F.2d 1454, 1461 (9th Cir. 1989).

The resolution of the foregoing disagreement depends upon whether or not the CSO's conduct amounted to coercion. A new trial is required if any communication between a court officer and juror is of a coercive nature. United States v . U.S. Gypsum Co., 438 U.S. 422, 460-62 (1978); Jenkins v. United States, 380 U.S. 445, 446 (1965). If coercive, prejudice is presumed and defendants' motion must be granted unless the harmlessness of the conduct is shown. Hobson v. Wilson, 737 F.2d 1, 47 (D.C. Cir. 1984), citing Mattox v. United States, 146 U.S. 140 (1892).

Existence of Coercion

To determine whether the CSO's actions were coercive, the court must examine the communications "in [their] context and under all the circumstances...." Jiminez v. Myers, 40 F.3d 976, 979-80 (9th Cir. 1993) (quoting Marsh v. Cupp, 536 F.2d 1287, 1290 (9th Cir. 1976) (quoting Jenkins, 380 U.S. at 446)). The court will consider the following factors in determining whether coercion is present: (1) with whom did the juror have contact; (2) the type of event alleged to be coercive; and (3) the length of time between the alleged coercive events and the verdict.

Discussion

The court now turns to its review of the newly developed evidence and application of the foregoing principles. The foregoing suggests the following issues to be decided: (1) are jurors' statements concerning contact with a CSO believable; (2) if so, was the CSO's conduct coercive; (3) if coercive, have plaintiffs demonstrated the harmlessness of the contact between jurors and the CSO; and (4) if not coercive, has Exxon shown actual prejudice and that the outcome would be different?

The primary focus of Exxon's second motion for new trial is on the conduct of CSO Donald Warrick. Exxon accuses CSO Warrick of eight separate acts of misconduct.[23] CSO Warrick is alleged to have attended a jurors' picnic on July 4, 1994. CSO Warrick is alleged to have had two separate contacts with Juror Dean. CSO Warrick is accused of the bullet incident with Juror Graham which was the subject of the court's Order No. 308. CSO Warrick is accused of lying to the court--a matter which does not appear to involve any juror directly. Finally, and most importantly, Exxon accuses CSO Warrick of three instances of improper contacts with Juror Wilson.

Juror Graham

The exchange between CSO Warrick and Juror Graham is described at some length in an earlier order.[24] Briefly summarized, it is now undisputed that a brief conversation involving a bullet and/or the CSO's weapon took place in a public area of the courthouse with Juror Graham. The inci-

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[23] Supplemental Memorandum in Support of Motion at 3-4, Clerk's Docket No. 7163.

[24] Order No. 308 (Feb. 20, 1996) at 21, Clerk's Docket No. 6638.

dent took place on or about September 7, 1994,[25] the mid-point of the 14 days of deliberations as to Phase III of the trial. The CSO lied to the parties and the court when he denied that the conversation had ever taken place. The marshal's investigation of this event shows that Graham treated this encounter as a bad joke. Graham was not sure whether he told anyone of the incident with the CSO, but says that if he told anyone it was jury foreman Murray who did not recall being informed of the encounter between Graham and the CSO.

The proof is now conclusive that the incident with CSO Warrick and Juror Graham took place. It was of a potentially coercive nature; however, the potential coercion was not directed at juror Graham, and the court finds that the incident did not adversely affect Graham's deliberations or coerce any other juror. The court specifically finds that Juror Graham was not coerced by the incident and that, with the possible exception of the jury foreman, the other jurors did not learn of the incident during the time they deliberated.[26] The lack of knowledge of the CSO/Graham incident on the part of other jurors is a matter of considerable import to which the court will return when discussing Juror Rita Wilson. Exxon has not shown prejudice or that the incident between CSO Warrick and Juror Graham affected the verdict. The court finds that the CSO's contact with Juror Graham was reprehensible but harmless.

For the reasons and upon the authorities discussed by the court in its order deciding the defendants' initial motion for new trial,[27] as modified and amplified by the foregoing, the court finds and concludes that the incident involving Juror

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[25] The incident occurred on a morning as juror Graham entered the courthouse, so it must have taken place after the events during the day of September 2, 1998, a Friday preceding the Memorial Day weekend, and therefore on September 6, 7, or 8, 1994. Transcript of juror interviews, Ex. B at 141, Clerk's Docket No. 7164.

[26] See testimony of ten jurors, Clerk's Docket No. 7164 (Ex. B).

[27] Order No. 308 (Feb. 20, 1996), Clerk's Docket No. 6638.

Graham and the CSO did not coerce a verdict.

Juror Wilson

The defendants' allegations of improprieties by a CSO in contact with Juror Wilson are by far the most troublesome and serious allegations made in support of the second motion for new trial. The plaintiffs contend that Juror Wilson's testimony is "simply not credible".[28] Exxon defends Juror Wilson's credibility, pointing out that, "[t]he liar and perjurer in this case is known."[29] Because the court was previously deceived by CSO Warrick regarding his contacts with one juror, the court has read and re-read the statements of all of the jurors taken in June of 1995 and has taken a great deal of time to consider what all have said and argued about a possible direct contact between CSO Warrick and Juror Wilson.

There have been a number of separate occasions on which the court has had an opportunity to observe and/or have some interaction with Mrs. Wilson. The first was in the course of jury selection. Mrs. Wilson's juror questionnaire gave no hint that a long trial and lengthy deliberations might be an unreasonable burden for her. The juror voir dire of Mrs. Wilson was essentially unremarkable. Second, the court had the opportunity of observing Mrs. Wilson during the course of trial. The court recalls that Mrs. Wilson was attentive. During Phase I, for reasons which are now lost to the court's memory, the court developed a concern for Mrs. Wilson's health such that when a note was received indicating that a juror was having a medical problem, the court assumed that it was Mrs. Wilson. In fact, it turned out to be a different juror who was then excused for medical reasons. Approximately one month prior to the close of testimony in Phase III, Mrs. Wilson expressed concern over her employment situation. The court personally spoke to Mrs. Wilson's

[28] Plaintiffs' Response to Exxon's Motion for New Trial at 11, Clerk's Docket No. 7164.

[29] An obvious reference to CSO Warrick; Exxon's Reply Memorandum at 3, Clerk's Docket No. 7167.

supervisor and ascertained that the supervisor was aware of Mrs. Wilson's situation and that the necessary administrative paperwork would be processed in order that Mrs. Wilson's job would not be adversely affected by her jury service. The situation appeared to present no difficulty whatever.

The circumstances of the court's third (and to this point, most direct) contact with Mrs. Wilson occurred on Thursday, September 8, 1994. These circumstances are set out in the court's order of February 20, 1996.[30] Briefly summarized, the situation was this. On September 2, 1995, a Friday prior to the Labor Day weekend, Mrs. Wilson was observed weeping in the anteroom directly outside the jury deliberation room. The court sent the jury home at this point and, on Tuesday morning, September 6, 1994, following the long weekend, gave a mild cautionary instruction to the jury suggesting that they treat one another courteously. The jury responded with a note that they were at an impasse, and the court then (the next morning) gave another, low-key instruction which in substance ignored the declaration of impasse, and suggested that the jurors take as much time as they needed to reach a verdict.[31]

On the same day, Wednesday, September 7, 1994, the jury passed a note to the court advising that a juror was emotionally unable to deliberate further. On the morning of September 8, the court ascertained that the juror in question was Mrs. Wilson, and, in the presence of counsel and on the record, inquired of Mrs. Wilson as to her situation. Mrs. Wilson expressed her desire to continue deliberations, concluding: "I feel really strong and I have to be there, I feel like that I make a difference."[32] Mrs. Wilson returned to the jury deliberation room. Shortly after the foregoing exchange, Mrs.

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[30] Order No. 308 (Feb. 20, 1996) at 10-17, Clerk's Docket No. 6638.

[31] At page 11 of Order No. 308 (Feb. 20, 1996), the court rejected Exxon's contention that this instruction was an "Allen charge".

[32] Trial Transcript, Vol. 46 at 7698, Clerk's Docket No.5807.

Wilson sent a note requesting to speak to the court again. The court met Mrs. Wilson at the jury room door and advised her that in light of what she had just said on the record, the court could do nothing further at that time beyond suggesting that the jurors follow the court's instructions.

There were five full days of uninterrupted jury deliberations between the last of the foregoing events and the day (September 16, 1994) that the Phase III verdict was returned. The jury was polled and all eleven jurors, including Mrs. Wilson, answered *in* the affirmative with respect to the entirety of the special verdict which had been reached.

Finally, and most importantly, the court observed Mrs. Wilson on the occasion of her deposition in connection with the instant motion on March 16, 1998. The deposition was arranged by the court personally through Mrs. Wilson's spouse. No subpoena was issued inasmuch as Mrs. Wilson indicated a willingness to appear voluntarily. At Mrs. Wilson's request through her spouse, arrangements were made to conduct the deposition away from the courthouse and with both Mr. Wilson and Mrs. Wilson's counsellor in attendance.

The court, plaintiffs' counsel O'Neill, and defense counsel Serdahely, as well as the court reporter, arrived at the agreed upon location for the deposition ahead of Juror Wilson. Mrs. Wilson entered with her husband and her counsellor, Karen Zenzig. Counsel sat on one side of a large conference table, and Juror Wilson, et al., occupied the other side of the table. Juror Wilson appeared apprehensive as she entered the room. The court sensed no hostility on the part of Juror Wilson or those who were with her.

Juror Wilson was sworn as a witness and Mr. Serdahely examined her on behalf of the defendants. Mr. Serdahely's demeanor was gentle. He spoke softly and calmly. He was not confrontational in any way. The questioning had not progressed more than a minute or two when the court observed that Juror Wilson's hands were trembling. By a few minutes into her examination, Juror Wilson's arms were

trembling, even though one hand was being held by her husband and the other by her counselor. By several more minutes into the examination, Juror Wilson was weeping, and within perhaps ten minutes of the start of the deposition, her entire body was trembling. Mrs. Wilson exhibited great emotional distress.

In similar stressful situations, most witnesses observed by the court have soon experienced considerable difficulty in speaking and they often find it impossible to continue answering questions until they have composed themselves. Such was not the case with Juror Wilson. She appeared oblivious to the violent trembling of her limbs and copious weeping.[33] Throughout the direct and cross-examination of Mrs. Wilson by plaintiffs' counsel O'Neill (which was more rapid and just a bit more forceful than that by defense counsel), Mrs. Wilson's demeanor remained the same.

Throughout the deposition, Mrs. Wilson gave the impression that she was well oriented as to time, place, and persons involved in the matters which were the subject of inquiry. Yet what the court observed tells a very different story. There was no objective reason for Mrs. Wilson to be fearful or emotional. The deposition was conducted at a place and under circumstances which she approved. While a lay person may often feel "butterflies in the stomach" at the prospect of testifying in a court proceeding, most soon become absorbed *in* the substance of the inquiry and appear quite at ease. Unlike many witnesses who testify before the court, Mrs. Wilson had absolutely nothing at stake. She did not stand to gain or lose anything as a result of her testimony. As a consequence, the severe trembling and copious weeping was a wholly inappropriate response to the circumstances. Given the situation and the subject matter of the deposition, the court could readily appreciate a juror expressing anger or annoyance, but the gross physiological response of Mrs.

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[33] On several occasions, Mrs. Wilson stated that she felt "embarrassed". The comments appeared not to have to do with her emotional state, but rather with the subject matter under discussion.

Wilson casts substantial doubt upon the reliability of what she has said.

The court turns now to what Mrs. Wilson told counsel and the court at the deposition held March 16, 1998. It developed at the outset that Mrs. Wilson knew who CSO Warrick was.[34] It was a matter of concern to the court and counsel whether Mrs. Wilson knew of the so-called "bullet incident" involving the CSO and Juror Graham. In response to the question, as clarified by plaintiffs' counsel, "were you ever made aware or were you aware [of that incident] at the time?", Mrs. Wilson responded, "Oh, yes, very much so."[35] What followed can only be described as bizarre and shocking. Exxon's attorney inquired as to what Mrs. Wilson recalled of the incident. The court cautioned that the participants not get into Mrs. Wilson's thought processes, and she responded with a question. "What they told me?"; whereupon the witness responded, "That I was wanted dead." Patently shocked, Mr. O'Neill interjected: "Who--I'm sorry." Mrs. Wilson went on to say in substance that the CSO and all of the rest of the jurors, except Margaret and Jewel wanted her "killed".[36]

With only a few digressions, the bulk of the remainder of

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[34] Wilson Transcript at 3. The transcript of the deposition of Mrs. Wilson is filed under seal at Clerk's Docket No. 7155.

[35] Id. at 5-6. In response to cross-examination questions on this same subject, Mrs. Wilson was asked:

> Q. So, Doug [Grahams] and the bailiff [CSO Warrick] were showing you guns?
>
> A. No, Doug didn't show me a gun, but I knew that Doug had been shown a gun. He told me he had, and then the bailiff had shownme a gun.

Id. at 25.

[36] Id. at 6.

Mrs. Wilson developed the foregoing theme.[37] Mrs. Wilson testified about several personal encounters with CSO Warrick on or about September 8, 1994, including an incident strikingly similar to the Warrick/Graham incident.[38] The court finds Mrs. Wilson's present memories of contacts with CSO Warrick and other jurors are not credible.

In explaining the foregoing, the court must first address its own embarrassment over learning that the "bullet incident" between the CSO and Juror Graham in fact occurred. In deciding Exxon's first motion for a new trial, the court in substance discounted the testimony of Juror Graham, only to learn that his rendition of the encounter with CSO Warrick was accurate and that CSO Warrick had lied to the court. It would be very easy at this juncture for the court to leap to the conclusion that, because the "bullet incident" took place with Juror Graham, the similar incident now described by Mrs. Wilson involving CSO Warrick and his weapon must also have occurred. That would be unfair to the plaintiffs and to the ten other jurors who labored for fourteen days to reach a verdict on Phase III.

In the March deposition, Mrs. Wilson accuses CSO Warrick of handling his weapon and a bullet in her presence just outside the jury deliberation room in the course of an intimidating conversation which she describes. Mrs. Wilson testified, on both direct and cross-examination, that the CSO took a bullet and placed it in his gun in her presence.[39] What surrounds this testimony is both confusing and incredible. Mrs.

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[37] In the examination of Mrs. Wilson, a lot was said without objection about interaction between Mrs. Wilson and other jurors. The court did not intervene due to the extremely stressful, although non-confrontational, nature of the discussion between counsel and Mrs. Wilson. Moreover, the court had been expressly told by Mr. Wilson in the course of arranging the deposition that he felt his wife needed to say some things to us for her own well-being.

[38] Wilson Transcript at 27-28.

[39] Id. at 8, 27.

Wilson appears to state under oath that she knew Graham had been shown a gun, and that Juror Graham told her (in the presence of the rest of the jury) that he could get a weapon from the bailiff.[40] Such is absolutely inconsistent with Graham's testimony when he was interviewed by the court in 1995. The marshal's investigation, as discussed above, has convinced the court that Mr. Graham has been truthful and that he has testified accurately when he says that no one (with tote possible exception of the jury foreman) was told of the bullet incident with CSO Warrick during deliberations. Later in her deposition, Mrs. Wilson says Juror Graham never told her about the bailiff showing him a bullet.[41] When asked whether there were other jurors of whom we might inquire on this subject, she responded "no", that the only persons who knew about the matter were "Karen and Jerry" (Mrs. Wilson's counsellor and spouse, respectively).[42]

During jury deliberations, Mrs. Wilson told other jurors the substance of what went on when she was outside the jury deliberation room.[43] According to the other jurors as interviewed in 1995, she never mentioned being threatened by a CSO. Jurors Johnson and Smith, with whom Mrs. Wilson had some favorable rapport, do not lend any support to Mrs. Wilson's recalled memories. And Mr. Wilson, when asked in 1995 by the court:

> Q. Was there ... ever a time when your wife indicated to you that anyone associated with Court, whether it be a bailiff or a court clerk or even myself, had any communication with her about the case that she considered to be inappropriate?

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[40] Id. at 26.

[41] Id. at 27.

[42] Id. at 42.

[43] See, for example, testimony of Juror hood. Clerk's Docket No. 7164, Ex. B at 197.

A. No.[44]

But the colloquy did not end there. The court pressed Mr. Wilson for whether he had any information about things going on outside the jury room, to which he responded:

> A. Okay. Well, when she'd come out of the deliberation room, there would be a guard or somebody out there, and they--she never brought up. It was usually they were trying to calm her down or comfort her in some way with words or sometimes hugs or whatever it took to get her calmed down.
>
> But the guards did on some occasions you know, console her, like I said, with hugs and words and other occasions redirected her and turned her right back into deliberation.
>
> Q. Do you have any reason to believe, based on what she told you, that there were-during those occasions when she was outside the jury room, that there were any communications with her about the deliberations from court personnel?
>
> A. I don't think it's about the subject of the deliberations, maybe the style or the vein that it was taking, but not-I don't think it had to do with the subject matter they were discussing.[45]

Plainly the foregoing is at odds with what the court is now told about the interchange between CSOs and Mrs. Wilson. Surely Mr. Wilson would have told the court in 1995 had he felt that his wife had been threatened or intimidated in the closing weeks of jury deliberation.

Mrs. Wilson's description of a personal encounter with CSO Warrick is substantially undercut by the absence of any clues of such misconduct in the course of the interviews of

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[44] Id., Ex. B at 239.

[45] Hearing Transcript (06/14/95 at 240-41).

other jurors in 1995. Mr. Wilson's 1995 testimony gave no hint of the encounter which Mrs. Wilson now recalls. Moreover, and this is based in part upon the court's own personal observations, other jurors appear to have been concerned for Mrs. Wilson's emotional well-being during deliberations, and Juror Hood in particular is known to have attended Mrs. Wilson in the anteroom to the jury deliberation room where both were once seen by a deputy court clerk and subsequently by the court itself. Mrs. Hood attended Mrs. Wilson on the two occasions of which the court has knowledge, during which Mrs. Wilson left jury deliberations in distress. Mrs. Hood has testified unequivocally that she has no knowledge of any coercion taking place outside the jury room.[46]

Mrs. Wilson kept a journal during the deliberations. None of the incidents which she now recalls and attributes to CSO Warrick are mentioned in the contemporaneous journal.[47] The marshal's investigation turned up no support for what Mrs. Wilson now recalls.

The court finds that Mrs. Wilson more probably than not did not learn of the bullet incident involving CSO Warrick and Juror Graham during the time the jury was deliberating. Rather, the court finds that she learned of this incident later, more probably than not as a result of publicity following the court's denial of Exxon's first motion for a new trial which followed the 1995 juror interviews. The court finds that Mrs. Wilson has unintentionally and mistakenly incorporated the incident between CSO Warrick and Juror Graham into her own experience where it formed the basis for erroneous, recently regained memories of other incidents which did not happen.[48]

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[46] Clerk's Docket No. 7164, Ex. B at 177-78.

[47] Wilson Transcript at 43-44.

[48] Id. at 37-38.

The Phase III jury deliberations were plainly an extraordinarily stressful experience for Mrs. Wilson. It appears that Mrs. Wilson is still struggling with her role in those deliberations and self-doubt about her joinder in the verdict. She should not have these concerns. All indications to the court are that Mrs. Wilson did everything (and perhaps a whole lot more) than could reasonably have been expected of her before agreeing to join in the verdict ultimately returned. The comments should not be taken to imply that Mrs. Wilson has testified untruthfully. The court is convinced that Mrs. Wilson believes what she has said. However, her present memories do not reflect what really happened. The court finds that Mrs. Wilson did not have any inappropriate, threatening, or coercive encounter with CSO Warrick during jury deliberations.

Exxon points to other alleged improprieties gleaned from Mrs. Wilson's testimony such as the incident attributed to Juror Dean. Mrs. Wilson says that after she capitulated and as the jury formed a line in the corridor outside the courtroom, ready to enter for the return of their verdict,[49] Juror Dean threatened her.[50]

Here also, and when Mrs. Wilson's recent testimony is examined in the light of the 1995 testimony of other jurors, the court finds that the allegation of a threat by Juror Dean is not credible. A quiet corridor with all of the other jurors in close proximity is not a likely place for a threat to have been made to Mrs. Wilson. In her recent testimony, Mrs. Wilson speaks of receiving death threats after she completed her jury service and returned to work.[51] She describes threatening notes being left on her automobile.[52] Mrs. Wilson says that

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[49] Id. at 20.

[50] Id. at 13.

[51] Mrs. Wilson testified that from the end of trial (September 16, 1994) until as attempted suicide in October of 1995, she received 30 to 50 death threats. Id., at 39.

[52] Id. at 40.

these incidents were informally reported to a police officer, but none of the notes were ever saved or brought to anyone's attention here.[53] It is likely that there are serious difficulties in Mrs. Wilson's life at the present time,[54] but Mrs. Wilson's allegation of a threat by Juror Dean is not credible.

One can infer from Mrs. Wilson's testimony that she was the last "holdout" as regards joining in the verdict which was rendered. The court does not doubt that she came under intense pressure from the other jurors to join them in a verdict. However, had Mrs. Wilson entertained serious reservations, or were the verdict against her will or otherwise coerced, she was afforded a perfect opportunity to recant if she had been of a mind to do so, for whatever reason, when the verdict was taken and the jury was polled. She did not do so. The court infers from her testimony that Mrs. Wilson now regrets having concurred in the verdict, and is expressing feelings of guilt for having given in. In light of the fact that deliberations went on for seven days after the court became aware of Mrs. Wilson having some distress, there is absolutely no reason for her or any juror to feel that they gave the deliberations anything short of their very best efforts.

Turning to the technical side of the contention that Mrs. Wilson was threatened by Juror Dean, this exchange is plainly one between two jurors at a point in time where a verdict has not yet been formally rendered, by which one juror seeks to impeach the verdict by conduct attributed to another juror. "Once a verdict has been delivered and accepted in open court, and the jury is polled and discharged, jurors may not claim that their assent was mistaken or unwilling." Traver v. Meshriy, 627 F.2d 934, 941 (9th Cir. 1980). The Exxon Valdez jury delivered its verdict in open court, was polled, and all jurors concurred in the verdict after the alleged threat. That verdict may not now be upset on the basis of a threat made by one juror to another.

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[53] Id.

[54] See Juror Testimony at Clerk's Docket No. 7164, Ex. B at 145.

The court concludes that Mrs. Wilson was not the subject of coercive conduct or other impermissible communications from CSO Warrick or another juror during jury deliberations.

Other Claims

Exxon makes several subsidiary claims of improprieties by CSO Warrick. He is said to have attended a picnic on the Fourth of July which was planned and attended by jurors. He is said to have had several other social encounters with Juror Dean.

As to the other incidents, the court finds that they probably happened. The court further finds that these incidents, and in particular those involving Juror Dean, were not coercive in nature or effect. Under such circumstances, Exxon must demonstrate actual prejudice and that the outcome was affected. See authorities at pages 8-9, supra. CSO Warrick's conduct evinces incredibly poor judgment, but Exxon has made no showing that these occurrences had or were likely to impact jury deliberations.[55] The contacts were not presumptively prejudicial. Exxon has not shown any actual prejudice as a result of the conduct, and has not shown that the outcome would have been different had-these social encounters between CSO Warrick and jurors not occurred.

Conclusion

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[55] The court is not unmindful that the investigation of CSO Warrick by the Marshals Service developed information suggesting that at the Fourth of July gathering of jurors, CSO Warrick complimented the jurors on the job they were doing. As of that date, the parties were is the midst of their presentation of the compensatory damages phase of the trial--an aspect of the case not focused upon by the motion for new trial. It is true that the jury had already determined the defendants' liability for positive damages; however, they were a long way from their unchallenged verdict as to compensatory damages and even further from their consideration -of the amount of punitive damages. The likelihood that a comment that the jury was "doing a good job" made in July would have any lasting impact upon the jury by the time it commenced consideration of the punitive damages phase of the case in September is nil.

The court has concluded that Mrs. Wilson's recall of events occurring three and a half years ago are untrustworthy. Considering all of the evidence, the court concludes that neither Juror Graham nor Juror Wilson were coerced by CSO Warrick. CSO Warrick's socializing with jurors was reprehensible, but not coercive. That conduct did not prejudice Exxon and did not affect the verdict. Exxon's motion for a new trial, joined in by defendant Hazelwood, is denied.

DATED at Anchorage, Alaska, this __ day of July, 1998.

H. Russel Holland, Judge
District of Alaska

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re the EXXON VALDEZ	)	
	)	No. A89-0095-CV (HRH)
This Order Relates to All Cases	)	

AMENDED ORDER NO. 339
Exxon's Second Motion for New Trial
(Coercion of Juror)

The Exxon defendants[1] (hereinafter Exxon) have moved pursuant to Rule 60(b)(2), Federal Rules of Civil Procedure, for a new trial as to Phase I (liability for punitive damages) and Phase III (amount of punitive damages).[2] In keeping with this court's standing orders for procedural matters in this case, Exxon sought and obtained leave for the filing of this motion.[3] Because this case was already on appeal to the Ninth Circuit Court of Appeals, the motion sought approval of an application to that court for a remand in order that the motion for new trial might be considered. The court indicated its willingness to receive a remand, and, on January 16,

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[1] Exxon Corporation (D-1) and Exxon Shipping Company (D-2).

[2] Clerk's Docket No. 7124. This motion was filed with the clerk of court on September 23, 1997, covered by a motion to lift stay on motion practice. Clerk's Docket No. 7116. The motion to lift stay was subsequently granted. Clerk's Docket No. 7123. Joseph Hazelwood (D-07) has joined in the motion. Clerk's Docket Nos. 7117, 7160.

[3] Order No. 335 (Oct. 9: 1997), Clerk's Docket No. 7123.

1998, the court received and filed the order of the court of appeals granting the parties' joint motion for a limited remand.[4]

Also included within Exxon's motion was a request for limited discovery. That request was granted.[5] In earlier proceedings (which are discussed below) and as a part of Exxon's first motion for a new trial, the court conducted a hearing at which the court, with input from counsel, interviewed ten of the eleven jurors who heard Phase III of the trial of this case, the husband of the eleventh juror, a court security officer, and a deputy clerk of court.[6] Because of concerns for the health of Rita Wilson, the eleventh juror, she was not interviewed.[7] (Mrs. Wilson had experienced a blood pressure problem during closing arguments and had become very emotional during Phase III deliberations.) As a consequence of information obtained by Exxon through discovery allowed in aid of this second motion for new trial, Exxon moved for leave to depose Mrs. Wilson.[8] The court granted leave to depose her.[9]

To complete the procedural development of this motion, and as approved by the court, supplemental memoranda summing up the positions of the parties with respect to Exxon's second motion for new trial have been filed.[10]

Background

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[4] Clerk's Docket No. 7131.

[5] Order No. 336 (Jan 23, 1998), Clerk's Docket No. 7132.

[6] Transcript of Sealed Hearing (June 13, 1995). Ex. 13 attached to Clerk's Docket No. 7164.

[7] Order No. 296 (Aug. 17, 1995), Clerk's Docket No. 6435.

[8] Clerk's Docket No. 7144.

[9] Order No. 337 at 2 (Mar. 5, 1998), Clerk's Docket No. 7146.

[10] Exxon's supplemental memorandum is at Clerk's Docket No. 7163, plaintiffs' response is at Clerk's Docket No. 7164, and Exxon's reply is at Clerk's Docket No. 7167.

Trial of Phase I of the Exxon Valdez litigation commenced on may 2, 1994. Verdicts were returned by the trial jury as to Phase I (liability for punitive damages) on June 13, 1994,[11] as to Phase II (compensatory damages) on August 11, 1994,[12] and as to Phase III (the amount of punitive damages) on September 16, 1994.[13] As to Phase II, the trial jury deliberated for 23 days; as to Phase III, the trial jury deliberated for 14 days. Because of the manner in which the trial was conducted and the form of the jury verdicts rendered, there was some considerable delay in the formulation of a final judgment which was not entered until September 24, 1996.[14]

On September 6, 1995, Exxon filed its first motion for a new trial pursuant to Rule 60(b)(2) as to Phases I and III (liability for and the amount of punitive damages).[15] Pertinent to what is now before the court, this initial motion for new trial raised issues of improper contact with jurors by Court Security Officer (CSO) Warrick.[16] After reviewing the circumstances concerning a communication between Juror Graham and CSO Warrick, and using words which have now come back to haunt this judge, it was said: "The court is not convinced that the incident [between Juror Graham and the CSO] ever occurred."[17] Hedging a bit, the court went on to conclude that: "If the incident took place as Juror Graham testified, then the CSO exercised incredibly poor judgment,

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[11] Clerk's Docket No. 5314.

[12] Clerk's Docket No. 5714.

[13] Clerk's Docket No. 5889.

[14] Clerk's Docket No. 6199.

[15] Clerk's Docket No. 6448.

[16] Order No. 308 (Feb. 20, 1696) at 9-23. Clerk's Docket No. 6638.

[17] Id. at 21-22.

but such foolishness would not warrant a new trial."[18] Exxon's motion for a new trial was denied.[19]

It is against, the foregoing background that the court received and considered Exxon's second motion for new trial. In its initial submission, Exxon made a prima facie showing that the incident between Juror Graham and CSO Warrick had indeed occurred. The United States Marshals Service had independently investigated the accusation that CSO Warrick had improperly contacted a juror. Both Warrick and Graham took a polygraph test. Ultimately Warrick confessed that the incident had taken place much as Juror Graham had described it.[20] CSO Warrick was terminated and subsequently died of natural causes.

In light of this development, and because Mrs. Wilson was the focus of the CSO's conversation with Juror Graham, the court became persuaded that she was the juror most likely to have been affected by the communication with Juror Graham if it had been communicated to her.[21] Accordingly, and as set out above, the court authorized a deposition of Mrs. Wilson. By agreement of the parties, Mrs. Wilson was examined by a single attorney for each side. The deposition was conducted in the presence of the court, but in the conference room of counsel for plaintiffs. Mrs. Wilson was accompanied by her husband and her counsellor. The transcript of Mrs. Wilson's deposition has been filed with the court under seal.[22]

Timeliness of Motion

Exxon's motion for a new trial is made pursuant to Rule

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[18] Id. at 23 (footnote omitted).

[19] Id. at 25.

[20] The details of this incident were set out and discussed by the court in order No. 308 (Feb. 20, 1996) at 21-23.

[21] Order No. 337 at 2 (Mar. 5, 1998), Clerk's Docket No. 7146.

[22] Clerk's Docket No. 7155.

60(b)(2), Federal Rules of Civil Procedure. The rule provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: ... (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b) . . . . The motion The motion shall be made within a reasonable time, and for reasons (1) , (2) , and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

Fed. R. Civ. P. 60(b).

Plaintiffs raise the issue of the timeliness of Exxon's motion for new trial and in so doing concede, as the plaintiffs must, that the request for leave to file the instant motion was filed on the 364th day following the entry of judgment. The motion itself was timely presented. The somewhat obscure but potentially significant point as regards timeliness which the plaintiffs make is that the newly discovered evidence known to Exxon in September of 199, upon which the instant motion is founded, was simply that the incident involving juror Graham and the CSO occurred much as the juror contended. The details of the marshal's investigation and Mrs. Wilson's testimony all came much later and were not known by Exxon until more than a year after judgment.

Rule 60(b)(2) plainly says that one must discover new evidence and act upon it by filing an appropriate motion within a year from the entry of judgment. If a party discovers new evidence which might justify seeking a new trial more than a year after the entry of judgment, the discovery is too late. Here we have a situation which the rule and, so far as the court is aware, the text writers do not address: May a party who has timely moved for a new trial on the basis of newly discovered evidence offer further support for that motion by way of additional new evidence which was not dis-

covered until after one year subsequent to the entry of judgment?

Plaintiffs rely upon Nevitt v. United States, 886 F.2d 1187 (9th Cir. 1989), for the proposition that the one-year period established by Rule 60(b) is jurisdictional and not subject to tolling. In Nevitt, and presumably here, the pendency of an appeal does not toll the one-year period. Nevitt, 886 F.2d at 1188. Nevitt, however, simply does not reach the question now before this court.

The court concludes that it has jurisdiction to entertain and decide on the merits Exxon's second motion for new trial. That motion was filed within one year from the entry of judgment, and the court has reacquired jurisdiction otherwise lost to the Ninth Circuit Court of Appeals by order of the latter court. Exxon made a prima facie showing that Order No. 337 was based in part upon the perjured testimony of a CSO. The court was requested to permit -- and, in the exercise of its discretion, did permit -- Exxon to undertake specific, limited discovery in furtherance of the second motion for new trial. That limited discovery led to a further motion to depose Rita Wilson which the court granted. The court concludes that Exxon is entitled to employ all of the newly discovered evidence, both that coming to their attention prior to filing their second motion for new trial, as well as that developed with court approval is subsequent proceedings on the motion for new trial.

The second motion for new trial was timely filed, and neither Rule 60(b)(2) nor any other authority called to the court's attention would foreclose the court from permitting Exxon a reasonable opportunity to further develop newly discovered evidence of substance which came to Exxon's attention prior to the one-year limitation period.

Rule 60(b)(2) Analysis

In deciding a motion based upon Rule 60(b)(2) filed in the context of potential jury coercion, the court must undertake a two-part analysis. First, the court determines whether

an evidentiary hearing is required. United States v. Madrid, 842 F.2d 1090, 1094 (9th Cir. 1988). This aspect of the case is not in dispute. There being a reasonable possibility of prejudice to the defendants, the court permitted the parties to inquire extensively of the trial jury in connection with the first motion for new trial and, as discussed above, granted Exxon's request for the development of new evidence of potential misconduct involving trial jurors. Neither plaintiffs nor Exxon has requested any further hearings. The hearing portion of the two-part analysis has been concluded.

The parties disagree as to the second step of the Rule 60(b)(2) analysis. Defendant contends on the basis of Remmer v. United States, 347 U.S. 227, 229-30 (1954), that contacts between court officers and jurors pertaining to the case are "presumptively prejudicial" and invalidate the verdict if harmful. Plaintiffs, on the other hand, assert that Exxon must show actual prejudice as a result of the conduct, Madrid 842 F.2d at 1093. and "that the outcome would have been different." Hard v. Burlington Northern R.R., 870 F.2d 1454, 1461 (9th Cir. 1989).

The resolution of the foregoing disagreement depends upon whether or not the CSO's conduct amounted to coercion. A new trial is required if any communication between a court officer and juror is of a coercive nature. United States v. U.S. Gypsum Co., 438 U.S. 422, 460-62 (1978); Jenkins v. United States, 380 U.S. 445, 446 (1965). If coercive, prejudice is presumed, and defendants' motion must be granted unless the harmlessness of the conduct is shown. Hobson v. Wilson, 737 F.2d 1, 47 (D.C. Cir. 1984), citing Mattox v. United States, 146 U.S. 140 (1892).

Existence of Coercion

To determine whether the CSO's actions were coercive, the court must examine the communications "in [their] context and under all the circumstances . . . ." Jiminez v. Myers, 40 F.3d 976, 979-80 (9th Cir. 1993) (quoting Marsh v. CURD, 536 F.2d 1287, 1290 (9th Cir. 1976) (quoting Jen-

kins, 380 U.S. at 446)). The court will consider the following factors in determining whether coercion is present: (1) with whom did the juror have contact; (2) the type of event alleged to be coercive; and (3) the length of time between the alleged coercive events and the verdict.

Discussion

The court now turns to its review of the newly developed evidence and application of tire foregoing principles. The foregoing suggests the following issues to be decided: (1) are jurors' statements concerning contact with a CSO believable; (2) if so, was the CSO's conduct coercive; (3) if coercive, have plaintiffs demonstrated the harmlessness of the contact between jurors and the CSO; and (4) if not coercive, has Exxon shown actual prejudice and that the outcome would be different?

The primary focus of Exxon's second motion for new trial is on the conduct of CSO Donald Warrick. Exxon accuses CSO Warrick of eight separate acts of misconduct.[23] CSO Warrick is alleged to have attended a jurors' picnic on July 4, 1994. CSO Warrick is alleged to have had two separate contacts with Juror Dean. CSO Warrick is accused of the bullet incident with Juror Graham which was the subject of the court's Order No. 308. CSO Warrick is accused of lying to the court -- a matter which does not appear to involve any juror directly. Finally, and most importantly, Exxon accuses CSO Warrick of three instances of improper contacts with Juror Wilson.

Juror Graham

The exchange between CSO Warrick and Juror Graham is described at some length in an earlier order.[24] Briefly summarized, it is now undisputed that a brief conversation involving a bullet and/or the CSO's weapon took place in a

[23] Supplemental Memorandum in Support of Motion at 3-4, Clerk's Docket No. 7163.

[24] Order No. 308 (Feb. 20, 1996) at 21, Clerk's Docket No. 6638

public area of the courthouse with Juror Graham. The incident took place on or about September 7, 1994,[25] the midpoint of the 14 days of deliberations as to Phase III of the trial. The CSO lied to the parties and the court when he denied that the conversation had ever taken place. The marshal's investigation of this event shows that Graham treated this encounter as a bad joke. Graham was not sure whether he told anyone of the incident with the CSO, but says that if he told anyone it was jury foreman Murray who did not recall being informed of the encounter between Graham and the CSO.

The proof is now conclusive that the incident with CSO Warrick and Juror Graham took place. It was of a potentially coercive nature; however, the potential coercion was not directed at juror Graham, and the court finds that the incident did not adversely affect Graham's deliberations or coerce any other juror. The court specifically finds that Juror Graham was not coerced by the incident and that, with the possible exception of the jury foreman, the other jurors did not learn of the incident during the time they deliberated.[26] The lack of knowledge of the CSO/Graham incident on the part of other jurors is a matter of considerable import to which the court will return when discussing Juror Rita Wilson. Exxon has not shown prejudice or that the incident between CSO Warrick and Juror Graham affected the verdict. The court finds that the CSO's contact with Juror Graham was reprehensible but harmless.

For the reasons and upon the authorities discussed by the court in its order deciding the defendants' initial motion for new trial,[27] as modified and amplified by the foregoing, the

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[25] The incident occurred on a morning as juror Graham entered the courthouse, so it must have taken place after the events during the day of September 2, 1994, a Friday preceding the Memorial Day weekend, and therefore on September 6, 7, or 8, 1994. Transcript of juror interviews, Ex. B at 141, Clerk's Docket No. 7164.

[26] See testimony of ten jurors, Clerk's Docket No. 7164 (Ex. B).

[27] Order No. 308 (Feb. 20, 1396) , Clerk's Docket No. 6638.

court finds and concludes that the incident involving Juror Graham and the CSO did not coerce a verdict.

Juror Wilson

The defendants' allegations of improprieties by a CSO in contact with Juror Wilson are by far the most troublesome and serious allegations made in support of the second motion for new trial. The plaintiffs contend that Juror Wilson's testimony is "simply not credible".[28] Exxon defends Juror Wilson's credibility, pointing out that, "[t]he liar and perjurer in this case is known."[29] Because the court was previously deceived by CSO Warrick regarding his contacts with one juror, the court has read and re-read the statements of all of the jurors taken in June of 1995 and has taken a great deal of time to consider what all have said and argued about a possible direct contact between CSO Warrick and Juror Wilson.

There have been a number of separate occasions on which the court has had an opportunity to observe and/or have some interaction with Mrs. Wilson. The first was in the course of jury selection. Mrs. Wilson's juror questionnaire gave no hint that a long trial and lengthy deliberations might be an unreasonable burden for her. The juror voir dire of Mrs. Wilson was essentially unremarkable. Second, the court had the opportunity of observing Mrs. Wilson during the course of trial. The court recalls that Mrs. Wilson was attentive. During Phase I, for reasons which are now lost to the court's memory, the court developed a concern for Mrs. Wilson's health such that when a note was received indicating that a juror was having a medical problem, the court assumed that it was Mrs. Wilson. In fact, it turned out to be a different juror who was then excused for medical reasons. Approximately one month prior to the close of testimony in Phase III, Mrs. Wilson expressed concern over her employ-

[28] Plaintiffs' Response to Exxon's Motion for New Trial at 11, Clerks Docket No. 7164.

[29] An obvious reference to CSO Warrick., Exxon's Reply Memorandum at 3, Clerk's Docket No. 7167.

ment situation. The court personally spoke to Mrs. Wilson's supervisor and ascertained that the supervisor was aware of Mrs. Wilson's situation and that the necessary administrative paperwork would be processed in order that Mrs. Wilson's job would not be adversely affected by her jury service. The situation appeared to present no difficulty whatever.

The circumstances of the court's third (and to this point, most direct) contact with Mrs. Wilson occurred on Thursday, September 8, 1994. These circumstances are set out in the court's order of February 20, 1996.[30] Briefly summarized, the situation was this. On September 2, 1994, a Friday prior to the Labor Day weekend, Mrs. Wilson was observed weeping in the anteroom directly outside the jury deliberation room. The court sent the jury home at this point and, on Tuesday morning, September 6, 1994, following the long weekend, gave a mild cautionary instruction to the jury suggesting that they treat one another courteously. The jury responded with a note that they were at an impasse, and the court then (the next morning) gave another, low-key instruction which in substance ignored the declaration of impasse, and suggested that the jurors take as much time as they needed to reach a verdict.[31]

On the next day, Wednesday, September 7, 1994, the jury passed a note to the court advising that a juror was emotionally unable to deliberate further. On the morning of September 8, the court ascertained that the juror in question was Mrs. Wilson, and, in the presence of counsel and *on* the record, inquired of Mrs. Wilson as to her situation. Mrs. *Wilson* expressed her desire to continue deliberations, concluding: "I feel really strong and I have to be there, I feel like that I make a difference."[32] Mrs. Wilson returned to the jury de-

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[30] Order No. 308 (Feb.'20, 1996) at 10-17, Clerk's Docket No. 5638.

[31] At page 11 of Order No. 308 (Feb. 20, 1996), the court rejected Exxon's *contention that* this instruction was an "Allen charge."

[32] Trial Transcript, Vol. 46 at 7698, Clerk's Docket No. 5807.

liberation room. Shortly after the foregoing exchange, Mrs. Wilson sent a note requesting to speak to the court again. The court met Mrs. Wilson at the jury room door and advised her that in light of what she had just said on the record, the court could do nothing further at that time beyond suggesting that the jurors follow the court's instructions.

There were five full days of uninterrupted jury deliberations between the last of the foregoing events and the day (September 16, 1994) that the Phase III verdict was returned. The jury polled and all eleven jurors, including Mrs. Wilson, answered in the affirmative with respect to the entirety of the special verdict which had been reached.

Finally, and most importantly, the court observed Mrs. Wilson on the occasion of her deposition in connection with the instant motion on March 16, 1998. The deposition was arranged by the court personally through Mrs. Wilson's spouse. No subpoena was issued inasmuch as Mrs. Wilson indicated a willingness to appear voluntarily. At Mrs. Wilson's request through her spouse, arrangements were made to conduct the deposition away from the courthouse and with both Mr. Wilson and Mrs. Wilson's counsellor in attendance.

The court, plaintiffs' counsel O'Neill, and defense counsel Serdahely, as well as the court reporter, arrived at the agreed upon location for the deposition ahead of Juror Wilson. Mrs. Wilson entered with her husband and her counsellor, Karen Zenzig. Counsel sat on one side of a large conference table, and Juror Wilson, et al. occupied the other side of the table. Juror Wilson appeared apprehensive as she entered the room. The court sensed no hostility on the part of Juror Wilson or those who were with her.

Juror Wilson was sworn as a witness and Mr. Serdahely examined her on behalf of the defendants. Mr. Serdahely's demeanor was gentle. He spoke softly and calmly. He was not confrontational in any way. The questioning had not progressed more than a minute or two when the court observed that Juror Wilson's hands were trembling. By a few

minutes into her examination, Juror Wilson's arms were trembling, even though one hand was being held by her husband and the other by her counsellor. By several more minutes into the examination, Juror Wilson was weeping, and within perhaps ten minutes of the start of the deposition, her entire body was trembling. Mrs. Wilson exhibited great emotional distress.

In similar stressful situations, most witnesses observed by the court have soon experienced considerable difficulty in speaking and they often find it impossible to continue answering questions until they have composed themselves. Such was not the case with Juror Wilson. She appeared oblivious to the violent trembling of her limbs and copious weeping.[33] Throughout the direct and cross examination of Mrs. Wilson by plaintiffs' counsel O'Neill (which was more rapid and just a bit more forceful than that by defense counsel) Mrs. Wilson's demeanor remained the same.

Throughout the deposition, Mrs. Wilson gave the impression that she was well oriented as to time, place, and persons involved in the matters which were the subject of inquiry. Yet what the court observed tells a very different story. There was no objective reason for Mrs. Wilson to be fearful or emotional. The deposition was conducted at a place and under circumstances which she approved. While a lay person may often feel "butterflies in the stomach" at the prospect of testifying in a court proceeding, most soon, become absorbed in the substance of the inquiry and appear quite at ease. Unlike many witnesses who testify before the court, Mrs. Wilson had absolutely nothing at stake. She did not stand to gain or lose anything as a result of her testimony. As a consequence, the severe trembling and copious weeping was a wholly inappropriate response to the circumstances. Given the situation and the subject matter of the deposition,

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[33] On several occasions, Mrs. Wilson stated that she felt "embarrassed". The comments appeared not to have to do with her emotional state, but rather with the subject matter under discussion.

the court could readily appreciate a juror expressing anger or annoyance, but the gross physiological response of Mrs. Wilson casts substantial doubt upon the reliability of what she has said.

The court turns now to what Mrs. Wilson told counsel and the court at the deposition held March 16, 1998. It developed at the outset that Mrs. Wilson knew who CSO Warrick was.[34] It was a matter of concern to the court and counsel whether Mrs. Wilson knew of the so-called "bullet incident" involving the CSO and Juror Graham. In response to the question, as clarified by plaintiffs' counsel, "were you ever made aware or were you aware [of that incident] at the time?", Mrs. Wilson responded, "Oh, yes, very much so."[35] What followed can only be described as bizarre *and shocking*. Exxon's attorney inquired as to what Mrs. Wilson recalled of the incident. The court cautioned that the participants not get into Mrs. Wilson's thought processes, and she responded with a question, "what they told me?"; whereupon the witness responded, "That I was wanted dead." Patently shocked, Mr. O'Neill interjected: "Who -- I'm sorry." Mrs. Wilson went on to say in substance that the CSO and all of the rest of the jurors, except Margaret and Jewel wanted her "killed".[36]

With only a few digressions, the bulk of the remainder of

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[34] Wilson Transcript at 3. The transcript of the deposition of Mrs. Wilson is filed under seal at Clerk's Docket No. 7155.

[35] Id. at 5-6. In response to cross-examination questions on this same subject, Mrs. Wilson was asked:

> Q. So, Doug [Graham] and the bailiff [CSO Warrick] were showing you guns?
>
> A. No, Doug didn't show me a gun, but I knew that Doug had been shown a gun. He told me he had, and then the bailiff had shown me a gun.

[36] Id. at 6.

Mrs. Wilson developed the foregoing theme.[37] Mrs. Wilson testified about several personal encounters with CSO Warrick on or about September 8, 1994, including an incident strikingly similar to the Warrick/Graham incident.[38] The court finds Mrs. Wilson's present memories of contacts with CSO Warrick and other jurors are not credible.

In explaining the foregoing, the court must first address its own embarrassments over learning that the "bullet incident" between the CSO and Juror Graham in fact occurred. In deciding Exxon's first motion for a new trial, the court in substance discounted the testimony of juror Graham, only to learn that his rendition of the encounter with CSO Warrick was accurate and that CSO Warrick had lied to the court. It would be very easy at this juncture for the court to leap to the conclusion that, because the "bullet incident" took place with juror Graham, the similar incident now described by Mrs. Wilson involving CSO Warrick and his weapon must also have occurred. That would be unfair to the plaintiffs and to the ten other jurors who labored for fourteen days to reach a verdict on Phase III.

In the March deposition, Mrs. Wilson accuses CSO Warrick of handling his weapon and a bullet in her presence just outside the jury deliberation room in the course of an intimidating conversation which she describes. Mrs. Wilson testified, on both direct and cross-examination, that the CSO took a bullet and placed it in his gun in her presence.[39] What surrounds this testimony is both confusing and incredible. Mrs.

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[37] In the examination of Mrs. Wilson, a lot was said without objection about interaction between Mrs. Wilson and other jurors. The court did not intervene due to the extremely stressful, although non-confrontational, nature of the discussion between counsel and Mrs. Wilson. Moreover, the court had been expressly told by Mr. Wilson in the course of arranging the deposition that he felt his wife needed to say some things to us for her own well-being.

[38] Wilson Transcript at 27-28.

[39] Id. at 8, 27.

Wilson appears to state under oath that she knew Graham had been shown a gun, and that Juror Graham told her (in the presence of the rest of the jury) that he could get a weapon from the bailiff.[40] Such is absolutely inconsistent with Graham's testimony when he was interviewed by the court in 1995. The marshal's investigation, as discussed above, has convinced the court that Mr. Graham has been truthful and that he has testified accurately when he says that no one (with the possible exception of the jury foreman) was told of the bullet incident with CSO Warrick during deliberations. Later in her deposition, Mrs. Wilson says Juror Graham never told her about the bailiff showing him a bullet.[41] When asked whether there were other jurors of whom we might inquire on this subject, she responded "no", that the only persons who knew about the matter were "Karen and Jerry" (Mrs. Wilson's counsellor and spouse, respectively).[42]

During jury deliberations, Mrs. Wilson told other jurors the substance of what went on when she was outside the jury deliberation room.[43] According to the other jurors as interviewed in 1995, she never mentioned being threatened by a CSO. Jurors Johnson and Smith, with whom Mrs. Wilson had some favorable rapport, do not lend any support to Mrs. Wilson's recalled memories. And Mr. Wilson, when asked in 1995 by the court:

> Q. Was there . . . ever a time when your wife indicated to you that anyone associated with Court, whether it be a bailiff or a court clerk or even myself, had any communication with her about the case that she considered to be inappropriate?

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[40] Id. at 26.

[41] Id. at 27.

[42] Id. at 42.

[43] See, for example, testimony of Juror Hood. Clerk's Docket No. 7164, Ex. B at 197.

A. No.[44]

But the colloquy did not end there. The court pressed Mr. Wilson for whether he had any information about things going on outside the jury room, to which he responded:

> A. Okay. Well, when she'd come out of the deliberation room, there would be a guard or somebody out there, and they -- she never brought up. It was usually they were trying to calm her down or comfort her in some way with words or sometimes hugs or whatever it took to get her calmed down.
>
> But the guards did on some occasions you know, console her, like I said, with hugs and words and other occasions redirected her and turned her right back into deliberation.
>
> Q. Do you have any reason to believe, based on what she told you, that there were -- during those occasions when she was outside the jury room, that there were any communications with her about the deliberations from court personnel?
>
> A. I don't think it's about the subject of the deliberations, maybe the style or the vein that it was taking, but not – I don't think it had to do with the subject matter they were discussing.[45]

Plainly the foregoing is at odds with what the court is now told about the interchange between CSOs and Mrs. Wilson. Surely Mr. Wilson would have told the court in 1995 had he felt that his wife had been threatened or intimidated in the closing weeks of jury deliberation.

Mrs. Wilson's description of a personal encounter with CSO Warrick is substantially undercut by the absence of any clues of such misconduct in the course of the interviews of

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[44] Id., Ex. B at 239.

[45] Hearing transcript (06/14/95) at 240-41.

other jurors in 1995. Mr. Wilson's 1995 testimony gave no hint of the encounter which Mrs. Wilson now recalls. Moreover, and this is based in part on the court's own personal observations, other jurors appear to have been concerned for Mrs. Wilson's emotional well-being during deliberations, and Juror Hood in particular is known to have attended Mrs. Wilson in the anteroom to the jury deliberation room where both were once seen by a deputy court clerk and subsequently by the court itself. Mrs. Hood attended Mrs. Wilson on the two occasions of which the court has knowledge, during which Mrs. Wilson left jury deliberations in distress. Mrs. Hood has testified unequivocally that she has no knowledge of any coercion taking place outside the jury room.[46]

Mrs. Wilson kept a journal during the deliberations. None of the incidents which she now recalls and attributes to CSO Warrick are mentioned in the contemporaneous journal.[47] The marshal's investigation turned up no support for what Mrs. Wilson now recalls.

The court finds that Mrs. Wilson more probably than not did not learn of the bullet incident involving CSO Warrick and Juror Graham during the time the jury was deliberating. Rather, the court finds that she learned of this incident later, more probably than not as a result of publicity following the court's denial of Exxon's first motion for a new trial which followed the 1995 juror interviews. The court finds that Mrs. Wilson has unintentionally and mistakenly incorporated the incident between CSO Warrick and Juror Graham into her own experience where it formed the basis for erroneous, recently regained memories of other incidents which did not happen.[48]

The Phase III jury deliberations were plainly an extraor-

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[46] Clerk's Docket No. 7164, Ex. B at 177-78.

[47] Wilson Transcript at 43-44.

[48] Id. at 37-38.

dinarily stressful experience for Mrs. Wilson. It appears that Mrs. Wilson is still struggling with her role in those deliberations and self-doubt about her joinder *in* the verdict. She should not have these concerns. All indications to the court are that Mrs. Wilson did everything (and perhaps a whole lot more) than could reasonably have been expected of her before agreeing to join in the verdict ultimately returned. The comments should not be taken to imply that Mrs. Wilson has testified untruthfully. The court is convinced that Mrs. Wilson believes what she has said. However, her present memories do not reflect what really happened. The court finds that Mrs. Wilson did not have any inappropriate, threatening, or coercive encounter with CSO Warrick during jury deliberations.

Exxon points to other alleged improprieties gleaned from Mrs. Wilson's testimony such as the incident attributed to Juror Dean. Mrs. Wilson says that after she capitulated and as the jury formed a line in the corridor outside the courtroom, ready to enter for the return of their verdict,[49] juror Dean threatened her.[50]

Here also, and when Mrs. Wilson's recent testimony is examined in the light of the 1995 testimony of other jurors, the court finds that the allegation of a threat by Juror Dean is not credible. A quiet corridor with all of the other jurors in close proximity is not a likely place for a threat to have been made to Mrs. Wilson. In her recent testimony, Mrs. Wilson speaks of receiving death threats after she completed her jury service and returned to work.[51] She describes threatening notes being left on her automobile.[52] Mrs. Wilson says that these incidents were informally reported to a police officer,

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[49] Id. at 20.

[50] Id. at 13.

[51] Mrs. Wilson testified that from the end of trial (September 16, 1994) until an attempted suicide in October of 1994, she received 30 to 50 death threats. Id. at 39.

[52] Id. at 40.

but none of the notes were ever saved or brought to anyone's attention here.[53] It is likely that there are serious difficulties in Mrs. Wilson's life at the present time,[54] but Mrs. Wilson's allegation of a threat by Juror Dean is not credible.

One can infer from Mrs. Wilson's testimony that she was the last "holdout" as regards joining in the verdict which was rendered. The court does not doubt that she came under intense pressure from the other jurors to join them in a verdict. However, had Mrs. Wilson entertained serious reservations, or were the verdict against her will or otherwise coerced, she was afforded a perfect opportunity to recant if she had been of a mind to do so, for whatever reason, when the verdict was taken and the jury was polled. She did not do so. The court infers from her testimony that Mrs. Wilson now regrets having concurred in the verdict, and is expressing feelings of guilt for having given in. In light of the fact that deliberations went on for seven days after the court became aware of Mrs. Wilson having some distress, there is absolutely no reason for her or any juror to feel that they gave the deliberations anything short of their very best efforts.

Turning to the technical side of the contention that Mrs. Wilson was threatened by Juror Dean, this exchange is plainly one between two jurors at a point in time where a verdict has not yet been formally rendered, by which one juror seeks to impeach the verdict by conduct attributed to another juror. "Once a verdict has been delivered and accepted in open court, and the jury is polled and discharged, jurors may not claim that their assent was mistaken or unwilling." Traver v. Meshriy, 627 F.2d 934, 941 (9th Cir. 1980). The Exxon Valdez jury delivered its verdict in open court, was polled, and all jurors concurred in the verdict after the alleged threat. That verdict may not now be upset on the basis of threat made by one juror to another.

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[53] Id.

[54] See Juror Testimony at Clerk's Docket No. 7164, Ex. B at 145.

The court concludes that Mrs. Wilson was not the subject of coercive conduct or other impermissible communications from CSO Warrick or another juror during jury deliberations.

Other Claims

Exxon makes several subsidiary claims of improprieties by CSO Warrick. He is said to have attended a picnic on the Fourth of July which was planned and attended by jurors. He is said to have had several other social encounters with Juror Dean.

As to the other incidents, the court finds that they probably happened. The court further finds that these incidents, and in particular those involving Juror Dean, were not coercive in nature or effect. Under such circumstances, Exxon must demonstrate actual prejudice and that the outcome was affected. See authorities at pages 8-9, supra. CSO Warrick's conduct evinces incredibly poor judgment, but Exxon has made no showing that these occurrences had or were likely to impact jury deliberations.[55] The contacts were not presumptively prejudicial. Exxon has not shown any actual prejudice as a result of the conduct, and has not shown that the outcome would have been different had-these social encounters between CSO Warrick and jurors not occurred.

Conclusion

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[55] The court is not unmindful that the investigation of CSO Warrick by the Marshals Service developed information suggesting that at the Fourth of July gathering of jurors, CSO Warrick complimented the jurors on the job they were doing. As of that date, the parties were is the midst of their presentation of the compensatory damages phase of the trial -- an aspect of the case not focused upon by the motion for new trial. It is true that the jury had already determined the defendants' liability for positive damages; however, they were a long way from their unchallenged verdict as to compensatory damages and even further from their consideration of the amount of punitive damages. The likelihood that a comment that the jury was "doing a good job" made in July would have any lasting impact upon the jury by the time it commenced consideration of the punitive damages phase of the case in September is nil.

The court has concluded that Mrs. Wilson's recall of events occurring three and a half years ago are untrustworthy. Considering all of the evidence, the court concludes that neither Juror Graham nor Juror Wilson were coerced by CSO Warrick. CSO Warrick's socializing with jurors was reprehensible, but not coercive. That conduct did not prejudice Exxon and did not affect the verdict. Exxon's motion for a new trial, joined in by defendant Hazelwood, is denied.

DATED at Anchorage, Alaska, this __ day of July, 1998.

H. Russel Holland, Judge
District of Alaska

Supreme Court, U.S.
FILED
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(2)

No. 00-90

In The

Supreme Court of the United States

EXXON MOBIL CORPORATION, et al.,

Petitioners,

v.

GRANT BAKER et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The court of appeals unanimously affirmed the district court's finding, after two evidentiary hearings, that a court security officer's remark to a single juror about putting another, obviously upset juror "out of her misery" – without any knowledge of her position on the merits or any reference to the substance of the case – was taken as nothing more than a tasteless joke that "did not introduce extraneous information into the deliberations," "was not, in context, actually coercive," and therefore "did not influence the jury's deliberations." Petitioner Exxon, however, asks this Court to set aside the jury's verdict because the court of appeals' opinion did not employ the language of "rebuttable presumption" that this Court used in two older criminal cases (involving extrinsic evidence of guilt and jury tampering), but instead followed precedent consistent with more recent decisions of this Court, which have not introduced any presumption into the process of determining whether such jury intrusions were prejudicial.

In these circumstances, Exxon would present the following question:

Was it reversible error for the courts below to determine the facts and circumstances relating to the nature and impact of the security officer's inappropriate remark, unrelated to the merits, without first positing a rebuttable presumption of prejudice?

RULE 29.6 DISCLOSURE

The parties to this case are listed at page ii of Exxon's petition. The two named corporate respondents, DEBRA LEE, Inc., and Dew Drop, Inc., have no parent corporations, subsidiaries or affiliates that have issued shares to the public.

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STATEMENT OF THE CASE

Affirming the district court, the court of appeals characterized the comment that is the sole subject of the petition as nothing other than "a strikingly tasteless joke" in reaction to a juror's "conspicuous emotionality, departure from the jury room, and crying," a joke that did not "involve any communication bearing on the substantive matters before the jury." Pet. App. 8a. The court of appeals thus endorsed the trial court's finding that Exxon had not been prejudiced:

> [A]fter careful review of the extensive evidentiary record and scrutiny of the district court's findings, we conclude that the district court correctly categorized the bailiff's conduct and words as an inappropriate ex parte contact with a juror that did not introduce extraneous information into the deliberations and was not, in context, actually coercive.

Pet. App. 11a. Exxon's Statement of the Case, however, argues the facts de novo, as if the two lower courts had not examined the extensive hearing record in making and affirming detailed findings of fact. Moreover, much of Exxon's Statement is devoted to overblown contentions and editorializations that are both peripheral to the "bullet remark" and, in any event, irrelevant here because they were rejected by findings of fact that Exxon does not now challenge.

Unlike Exxon's, this Statement of the Case will present the pertinent facts in a manner consistent with the findings of the two courts below. With respect to Exxon's assertions about matters other than the "bullet remark," this Statement will rely principally on the court of

appeals' opinion (Pet. App. 1a-23a) and the district court's two opinions (Order 308, attached as Supp. App. 1-25, and Amended Order 339, Pet. App. 46a-67a).[1] This Statement will, however, review the record relating to Juror Wilson's emotional condition and the trial court's careful efforts to deal sensitively with it, not because it is material here but because it is appropriate to answer Exxon's distorted effort to create the impression – at odds with the factual findings of the courts below – that there was some kind of general conspiracy to coerce Juror Wilson and thereby perpetrate a miscarriage of justice against Exxon. On the facts found by the two courts below, the result of this case would have been the same in any circuit.

A. Pertinent Events During the Trial

Trial began on May 2, 1994, and concluded on September 16, 1994, when the jury returned its punitive damages verdict against Exxon. During the three phases of trial, several court security officers (CSOs) rotated as bailiffs for the jury. SER 212:21, 279:17-280:9, 382:18,

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[1] Order 308, which followed the first hearing on Exxon's various complaints about the jury, was omitted from the appendix to the petition. The petition does, however, inexplicably reproduce both Order 339, which followed the second hearing, and Amended Order 339, which corrected certain typographical errors in the original Order 339. (Amended Order 339 includes a footnote explaining the corrections, but Exxon has omitted that note from its appendix.) This Opposition refers to the Amended Order as "Order 339."

383:10-12;[2] ER 266-267, 310. Exxon focuses on one CSO, Don Warrick. Although a new CSO, the court of appeals observed that "[h]e was experienced and much decorated, as a police officer and before that in the military." Pet. App. 4a. As the courts below noted, Warrick did have some questionable social contacts with jurors at a picnic and on other occasions during the trial, but those contacts were determined to be benign in findings that Exxon no longer challenges. *See* Pet. App. 7a, 44a. The court of appeals put the CSO's juror contacts in perspective:

> Long trials are especially vulnerable to *ex parte* contacts, because people around the courthouse get to know the jurors, and it becomes much harder for jurors and others to preserve an artificial social isolation as days stretch into weeks.

Pet. App. 10a.

At about noon on Friday, September 2, 1994, the fourth full day of the jury's punitive damage deliberations, Jurors Rita Wilson and Linda Hood came out of the jury room into the adjoining anteroom. SER 265-268. Ms. Wilson was sobbing. Supp. App. 10. CSO Warrick, who was on duty, SER 265-268, summoned the court clerk, who contacted the judge. SER 276. Ms. Hood remained with Ms. Wilson throughout this time. SER 77, 179-181. To

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[2] "SER" refers to the Supplemental Excerpts of Record filed by plaintiffs in the court below. (The remaining abbreviations in this brief will follow the conventions adopted by Exxon in its petition. *See* Pet. 4 n.1.) The complete transcript of the interview of Juror Wilson appears only in the Supplemental Excerpts of Record, SER 1-288, since Exxon included only fragments in its excerpts of record below.

the extent Warrick spoke to Ms. Wilson, he was "consoling" and "relaxed her." SER 197:9-16, 240-241; *see* SER 251-252. On being alerted to the situation, the trial judge approached Ms. Hood and Ms. Wilson, instructed them not to tell him anything about the deliberations, and had "diffuse conversation with both of them about what the problem was, and frankly learned little or nothing about what the problem was." ER 408. *See also* ER 410 ("some family difficulty with a child"). The judge promptly consulted with counsel and thereafter excused the jury for the Labor Day weekend. Supp. App. 10; ER 168, 386, 409.

The jury returned on Tuesday, September 6, 1994. ER 408. As Juror Doug Graham arrived at the courthouse that morning, CSO Warrick motioned to him. ER 302; SER 141. Referring to Juror Wilson, Warrick pulled a bullet out of his pocket (SER 320-324) or his revolver (ER 276), and wisecracked that maybe Ms. Wilson should be put out of her misery. Pet. App. 4a. Both Warrick and Graham understood that Warrick was making a joke. Pet. App. 54a; ER 303-304; SER 320, 321, 324, 345-348. The fact that Warrick made such a remark "really shook . . . up" Graham, SER 142, but he did not take the substance of the remark seriously. Pet. App. 4a; ER 276-277. Graham did not tell any other juror (with the possible exception of the foreman, who did not believe he was told) or the court about the brief conversation.[3]

A few minutes later, after all the jurors had arrived, the district court gave the jury Supplemental Instruction A, a

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[3] Although Exxon suggests that other jurors became aware of the conversation, Pet. 6-7, the district court found to the contrary. Pet. App. 54a.

variation on an Exxon-proposed instruction designed to address whatever situation might have precipitated Ms. Wilson's sobbing on the previous Friday. Supp. App. 10; SER 289-290; ER 408-409. This instruction directed the jurors to be courteous to one another and to listen carefully to and consider each other's views, but not to surrender honest convictions for the mere purpose of returning a verdict. *Id.* Several hours later, the jury sent out a note stating:

> After reviewing the Supplemental Jury Instruction No. A, the Jurors have consulted with each other and we have reached a[n] impasse.

Supp. App. 11; ER 78. The note did not suggest that further deliberations would be futile, but went on (in a passage that Exxon fails to mention when describing this event, Pet. 7) to "request further instructions from the Court at this point." *Id.*

The next morning, after consulting with counsel, the trial judge determined that an additional "very soft instruction" was appropriate. Supp. App. 12; ER 410. He shared with counsel his view "that the jury is into some tough duty, some tough time as far as what they are doing." The judge continued:

> At this time I decline to treat that note as a real statement that we are at impasse, and I choose to focus on the second sentence of the note, which really says, give us some help.

Id. Supplemental Instruction B thus advised the jury that "[g]iven the complexity and duration of this case, as well as the divergence of positions between the parties, it is not surprising that individual jurors might, at this stage

of your deliberations as to Phase III [the punitive damages phase], have divergent views about the case." Supp. App. 11; SER 291-292; ER 410-411. It encouraged the jury to use the "techniques which have served you well previously" in reaching verdicts in earlier phases of the trial, to review the instructions and the evidence, and to "be as leisurely in your deliberation as the occasion may require." *Id.*

The jury proceeded with its sixth full day of punitive damages deliberations. While the jury was deliberating, Juror Wilson's husband visited the trial judge to express concerns about her emotional health. ER 171; SER 255:5-256:13, 309. Mr. Wilson said nothing to suggest there had been any inappropriate communications from court personnel or anyone else. SER 233-242, 251-252.

At the close of that day's deliberations, the jury sent another note:

> We have reviewed your supplemental Jury instructions [A and B] from Tuesday, September 6th and Wednesday, September 7th. We have also reviewed the Jury instructions from Phase I, III. We have one Juror that we feel is emotionally unable to deliberate within the Jury instructions the court has provided. We have reached a crucial stage in our deliberation that has left us concerned about her emotional and physical health.

Supp. App. 13; ER 79; SER 218-219. The court again consulted with counsel. It was agreed that the next morning, the court, "with only the absolute minimum number of counsel present," would meet informally with the juror

at issue to determine "whether she is having some continuing health problem that is interfering with jury deliberations." SER 306.[4]

At the meeting, the judge read Ms. Wilson the note expressing concern about her health, told her that her husband had paid a visit to express the same concern, and advised her that she should not disclose the substance of the deliberations or how the jury stood numerically on any issue. Supp. App. 14 & n.13; SER 308-309. In the ensuing dialogue, Ms. Wilson acknowledged being "stressed out" but expressed her personal desire to continue deliberating. She asserted that "I feel really strong and I have to be there, I feel like I make a difference." Supp. App. 14-15; SER 309-10. The court then announced that it was "satisfied" that Ms. Wilson could continue deliberating, and Exxon's counsel agreed on the record. SER 310. After Ms. Wilson left, the court expressed its view "that the only problem is that there is some tough debating going on in there, and I don't see any cause for our doing anything other than let the deliberations take their course, whatever that may be at this point." Supp. App. 15; SER 311.

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[4] The foreman had identified Ms. Wilson as the juror about whom the jury had expressed concern. SER 308. (Exxon's assertion that the foreman identified Ms. Wilson as "the hold-out juror," Pet. 7, misstates the record; he identified her only as the juror who was the subject of the note. Supp. App. 16 n.14; SER 306-308.) At this time, Exxon asked the court "to consider" interviewing all of the jurors. Contrary to Exxon's statement that the court "rejected" a "request" to interview other jurors, Pet. 7, the court held that request in abeyance. SER 306-307. Exxon never renewed the request after the meeting with Ms. Wilson. *See* SER 311-314.

Ms. Wilson rejoined deliberations. Almost exactly an hour later, however, she sent a note to the court, the full text of which stated "I need to speak with you." Supp. App. 17; ER 80. The trial judge met Ms. Wilson at the jury room door, where she "in substance ask[ed] to be excused." Supp. App. 17 n.15; SER 257:1-8; ER 175. Having just been told by Ms. Wilson in the presence of counsel that she felt capable of deliberating, the judge told her that he "could do nothing further at this time beyond telling her to follow the court's instructions." Supp. App. 17; ER 80, 175; SER 257:6-7. He reported to counsel on the substance of his encounter. ER 80. Exxon requested no further action.

The jury continued deliberating for the remainder of that week and all of the following week. Neither Ms. Wilson nor her husband attempted to communicate with the court, and there was no indication of problems in the jury room. Indeed, the jury sent out several notes during this period, all of which were unexceptional and showed that the jury was going about its business. Supp. App. 21 (facts "indicative of a jury working carefully and deliberately"); SER 294-296. On Friday September 16, 1994, the thirteenth full day of deliberations and nine deliberation days after the exchange between CSO Warrick and Juror Graham that is the sole subject of Exxon's petition, the jury returned its punitive damages verdict against Exxon. ER 81; SER 315-318. The jury was polled in open court and each juror, including Ms. Wilson, affirmed that he or she agreed with the verdict. *Id.*

B. The District Court's 1995 Investigation of the Jury

On January 22, 1995, the *Anchorage Daily News* published an article about the jury's deliberations. ER 87. Relying upon the article, Exxon sought to question the jurors or have the court hold an evidentiary hearing to determine if the jury had been exposed to improper contacts or excluded evidence in a number of respects. ER 83.

On June 13 and 14, 1995, with counsel present, the court interviewed ten of the eleven jurors, Mr. Wilson, CSO Warrick and the courtroom clerk.[5] SER 1. The court asked each juror open-ended questions about whether the juror had received information regarding excluded evidence and whether there had been any attempts to interfere with the jury or inappropriate contacts from court personnel or other third persons. *Id.* Counsel were permitted to ask follow-up questions. *Id.* Juror Graham then described, for the first time, his September 6 conversation with CSO Warrick. SER 141-144. Warrick denied the conversation. SER 268-271. Mr. Wilson's testimony mentioned no threats, inappropriate communications or misconduct by CSO Warrick or anyone else. To the contrary, Mr. Wilson testified that the CSOs sometimes "were

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[5] During trial, one juror was excused for health reasons, leaving eleven. ER 386. The parties had stipulated that if jurors were excused, a unanimous verdict from the remaining jurors would be accepted, provided at least six remained. ER 10. The court decided to interview Mr. Wilson instead of Ms. Wilson because the "court has reason to believe that Mrs. Wilson's health may have been adversely affected by her jury duty. The court will not expose Mrs. Wilson to additional stress unless a more robust showing of need to do so is made." ER 118. *See also* ER 337.

trying to calm [Ms. Wilson] down or comfort her in some way with words or sometimes hugs or whatever it took to get her calmed down." SER 240:15-24. In response to questioning from Exxon's counsel, Mr. Wilson affirmed that his wife never mentioned anything about communications from court personnel concerning jury deliberations. SER 251:2-252:9.

On September 6, 1995, nearly a year after the verdict, Exxon filed a motion for new trial based on information gleaned from the juror interviews. ER 136. Exxon's motion rested in part on the Warrick-Graham conversation and the district court's supplemental instructions and contacts with Ms. Wilson. ER 159-160. The court denied Exxon's motion in Order 308. *See* Supp. App. 1-25. In so doing, the district court characterized much of Exxon's factual argument concerning Ms. Wilson (some of which it repeats in its petition) as "melodrama" and "an extraordinary and exaggerated account of the events." Supp. App. 19. With respect to the bullet conversation, the court stated that it was "not convinced that the incident ever occurred," Supp. App. 22, but went on to find that "[a]ssuming *arguendo* that it did occur, the incident does not warrant a new trial," detailing its reasons for finding the comment to have been harmless under the circumstances. Supp. App. 22-24.

Judgment was entered, and Exxon appealed. ER 184, 187, 189. Exxon sought review of only one part of Order 308, *i.e.*, the rejection of its contention that the jury had been exposed to certain excluded evidence. ER 160-162.

C. The Marshals Service Personnel Investigation of CSO Warrick.

The June 16, 1995 *Anchorage Daily News* reported on the district court's jury interviews. After the district's marshal learned of the allegations concerning CSO Warrick, he contacted the U.S. Attorney's office in Anchorage, the Marshals Service Internal Affairs Division and the Office of Inspector General, all of which declined to pursue the matter but gave permission for a local investigation. SER 319-320, 326-327, 332-334. The marshal met with the trial judge and advised him that while "there wasn't anything criminal there, I still felt the CSO had violated some of our internal policies and that we were going to do our own personnel investigation on it." SER 327. He determined that, if the personnel investigation revealed a serious problem, he would brief the court on the results. SER 329-330.

A deputy marshal reviewed the jury interview transcripts and interviewed Juror Graham, the jury foreman and two other jurors, as well as CSO Warrick. In addition, both Graham and Warrick were given polygraph examinations. Graham passed his examination, while Warrick's exams were inconclusive. SER 320, 338, 349-351. When questioned further, Warrick admitted to the "bullet" conversation with Graham, stating that he had been joking and that he had never threatened or tried to intimidate anyone on the jury. ER 301-304. Both the marshal and the polygraph examiner believed this explanation.

SER 320, 345, 347-348. Nonetheless, the marshal told Warrick that because he had previously lied about the incident, he must either resign or be fired. Pet. App. 5a; SER 320, 338-340. Warrick resigned. *Id.*

In summarizing his investigation, the marshal concluded:

> Nothing in the investigation indicated that there was any cause to believe that harm was done to anyone involved in the Exxon Valdez trial, and the matter was closed following Don Warrick's resignation.

SER 320. Because the marshal concluded that Warrick's conduct had no impact on the trial, he did not report the results of his investigation to the court. SER 329:23-330:3, 342:2-5. Four months after resigning, Warrick died of a heart attack. ER 217.

D. Exxon's 1997 Rule 60(b) Motion for New Trial.

On September 23, 1997, the 364th day after entry of judgment (and more than three years after the verdict), Exxon moved for a new trial pursuant to Federal Rule of Civil Procedure 60(b)(2) on the ground of newly discovered evidence, *i.e.*, the marshal's determination that the Warrick-Graham conversation had in fact occurred. ER 192-194. The district court indicated its willingness to accept, and the Ninth Circuit granted, a remand "for the limited purpose of considering Exxon's Rule 60(b) motion (and related request for discovery)." ER 254B.

Exxon then took depositions of the marshal, the investigating deputy and the polygraph examiner, all of

whom discussed the personnel investigation in detail. SER 325-379. Exxon also deposed Ms. Wilson in the presence of the court, her husband, and her therapist. Her testimony is discussed in detail in the court of appeals' opinion (Pet. App. 12a-23a), which concluded that "she described events so unlikely, with a demeanor so extreme, that a finder of fact could reasonably conclude [as the trial court did] that she suffered [at the time of her testimony] from a condition that would distort her perceptions or recollections." Pet. App. 20a. As to the Warrick-Graham incident, Ms. Wilson asserted at some points that she knew about Warrick showing a gun to Graham, claiming Graham had told her in the presence of the jury that he could get a gun from Warrick and put her out of her misery, and that the other jurors discussed Graham's statement. SER 384:20-385:22, 404:15-405:21, 419:21-421:5. When pressed about her allegation that Graham and the other jurors discussed the bullet incident, however, she twice retreated and answered directly that she did not know about the incident. SER 406:6-10 ("I didn't know that"), 420:23-42:5 ("I didn't know anything about Don showing bullets to Doug").

The district court's Order 339 denied Exxon's motion. Based upon his observations of the jurors over their months of service, his interviews of all the jurors after the verdict, and his review of the marshal's investigation, the trial judge concluded "that Graham treated this encounter as a bad joke." Pet. App. 54a.

> [T]he court finds that the incident did not adversely affect Graham's deliberations or coerce any other juror. The court specifically finds that Juror Graham was not coerced by the

> incident and that, with the possible exception of the jury foreman, the others did not learn of the incident during the time they deliberated.

Id. Accordingly, the court concluded that the incident between Graham and Warrick "was reprehensible but harmless" and that it "did not coerce a verdict." Pet. App. 54a-55a. In evaluating Ms. Wilson's testimony, the district court described in detail her appearance and behavior, Pet. App. 57a-60a, and then found that "her present memories do not reflect what really happened." Pet. App. 64a. The court specifically found that Ms. Wilson did not know about Warrick's remark during trial. Pet. App. 63a.[6] As previously noted, a unanimous panel of the court of appeals affirmed.

REASONS FOR DENYING THE PETITION

Exxon's petition presents no issue requiring this Court's consideration. The decision below is consistent with this Court's most recent decisions concerning improper contacts with jurors, and Exxon's purported

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[6] The court noted that Ms. Wilson's testimony to the contrary was "absolutely inconsistent" not only with the testimony of Graham, but also with that of all of the other jurors. Pet. App. 61a. The court concluded that Ms. Wilson likely learned of the Warrick-Graham exchange as a result of publicity after the trial was over. Pet. App. 63a; *see also* Pet. App. 13a. This is consistent with the facts that the local newspaper reported the incident both immediately after the 1995 interviews and at the time of Exxon's 1997 motion for new trial, and that Mr. Wilson kept a clippings file about the case and discussed the clippings with Ms. Wilson. SER 231:2-10, 411:7-412:3, 414:4-415:18.

conflict among the circuits regarding rebuttable presumptions involves, at most, variations in the words chosen to explain substantively similar reviews of the facts of particular situations.

Here, the district court took measured steps to confirm Ms. Wilson's ability to participate fully in the deliberations, to deal with the problems presented by her various upsets, and to assure that the verdict reflected full and fair deliberation and the free assent of all jurors. When Exxon filed its several challenges to the jury over a period of three years, the district court conducted two extensive hearings, in which every witness with potential knowledge of the events was examined under oath. Even Exxon does not fault the trial court's conduct of these inquiries or the adequacy of the record to assess the presence or absence of prejudice. Based on these hearings, the trial court twice made detailed findings, determining that the CSO's "bullet remark" – which is the sole subject of Exxon's petition – had no impact on any juror and was harmless. The court of appeals carefully reviewed the trial court's findings and the record, and it affirmed.

On the facts found by the courts below, the outcome of this case would have been no different in any other circuit. In substance, then, Exxon is asking this Court to set aside the concurrent findings of no prejudice made by the two courts below, a task that the Court consistently and properly refuses to undertake. *See Graver Manufacturing Co. v. Linde Co.*, 336 U.S. 271, 275 (1949) (Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error"); *Goodman v. Lukens Steel Co.*,

482 U.S. 656, 665 (1987). In view of this Court's most recent and comprehensive reiteration of the governing principles, and given the absence of any outcome-determinative conflict among the circuits, there is no reason for the Court to revisit the subject of jury intrusions in this case.

A. The Decision Below Is Consistent with This Court's Decisions Concerning Jury Intrusions, Which Focus on the "Ultimate Inquiry" into Prejudice Rather Than Attaching Decisional Significance to Any Presumption.

This Court's decisions on jury contacts have not turned on the application of any presumption of prejudice. Instead, the Court has focused on the need for a thorough inquiry – such as that conducted here – whenever the integrity of a jury verdict has been threatened by external influences. Once that inquiry has occurred, the facts determine the outcome of the case, without reference to any presumption.

In the most recent of its jury intrusion decisions, this Court declined to attach any significance to the presence or absence of a presumption of prejudice in a federal criminal case involving improper presence of alternate jurors in the jury room after they should have been discharged. As the Court explained, "a presumption of prejudice as opposed to a specific analysis does not change the ultimate inquiry: Did the intrusion affect the jury's deliberations and thereby its verdict?" *United States v. Olano*, 507 U.S. 725, 739 (1993). In holding that the

intrusion there was not prejudicial, the Court summarized the principles of what it called " 'intrusion' jurisprudence" as follows:

> We generally have analyzed outside intrusions upon the jury for prejudicial impact. . . . A prime example is *Remmer v. United States*, 347 U.S. 227 (1954), where . . . [the Court] remanded for the District Court to 'determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." *Id.*, at 229-230.
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> This "intrusion" jurisprudence was summarized in *Smith v. Phillips*, 455 U.S. 209 (1982):
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> > "[D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable . . . . [I]t is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Id.*, at 217.

Olano, 507 U.S. at 738.

The body of "intrusion jurisprudence" described in *Olano* began with *Mattox v. United States*, 146 U.S. 140 (1892), where the intrusion was of the most egregious sort. In *Mattox*, someone had read aloud to the jurors a newspaper article that praised the prosecution, described the defendant's prior trial for murder, and assessed the

strength of the evidence. 146 U.S. at 150-51. Further, the bailiff told the jurors "that this was the third person Clyde Mattox had killed." 146 U.S. at 151. On these facts, the Court required no further inquiry to assess the nature and impact of the intrusion. Instead, the Court in effect found prejudice inherent in the nature of the extraneous contacts, based solely on post-judgment affidavits submitted by the defendant. *Mattox* thus laid down no rules for hearings to examine external influences, since it ordered no hearing at all.

The need for a hearing, on the other hand, lay at the core of the Court's decisions in *Remmer v. United States*, 347 U.S. 227 (1954) (*Remmer I*), and *Remmer v. United States*, 350 U.S. 377 (1956) (*Remmer II*). In *Remmer I*, the Court remanded to the district court for a hearing to explore the circumstances and impact of an apparent attempt at jury tampering, which had been followed by an FBI investigation involving one of the jurors. In ordering a hearing on the allegation of prejudice, the Court observed that the contacts were "presumptively prejudicial" – the language upon which Exxon relies so heavily in its petition. As the Court explained in *Remmer II*, however, the remedy for such an allegation was a hearing, so the presumption could be replaced with the facts:

> It was the paucity of information relating to the entire situation coupled with the presumption which attaches to the kind of facts alleged by petitioner which, in our view, made manifest the need for a full hearing.

350 U.S. at 379-80. On remand, the lower court held an unduly limited hearing, confining its inquiry to the nature of the FBI investigation. Accordingly, in *Remmer II*

this Court itself conducted the ultimate inquiry into the impact of the intrusion on the jury's deliberations. Without purporting to apply any presumption, the Court determined that the record made it "quite evident" that the juror had been influenced, characterizing him as "disturbed and troubled" by the events. 350 U.S. at 381. Thus, the two *Remmer* decisions held only that prejudice in the case of jury tampering will be presumed unless and until the trial court determines otherwise after a full investigation of the pertinent circumstances. Exxon in effect concedes that such an investigation occurred in this case.[7]

Between *Remmer II* and *Olano*, the Court decided three other cases involving extraneous influences on jurors, without once applying any presumption of prejudice as part of its analysis. In *Parker v. Gladden*, 385 U.S. 363 (1966), the trial court had conducted a hearing after which it found prejudice based on a bailiff's comments that the defendant was a "wicked fellow" and that any error in convicting him could be corrected by the

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[7] Since *Remmer*, the courts of appeals have considered dozens of cases involving post-trial hearings into potential jury intrusions or juror misconduct. Because of the "kaleidoscopic variety of possible problems," the lower courts uniformly recognize the need to give district judges flexibility in addressing and resolving jury intrusion issues. *See, e.g., United States v. Boylan*, 898 F.2d 230, 258 (1st Cir. 1990), and cases cited therein. In general, to avoid subjecting jurors "to undue impositions," *id.*, the trial court in a "*Remmer* hearing" should confine its inquiry "to only what is absolutely necessary to determine the facts with precision." *United States v. Ianniello*, 866 F.2d 540, 544 (2d Cir. 1989). As explained in the Statement, the district court here went the extra mile to determine what happened.

Supreme Court. This Court reinstated the trial court's grant of a new trial, reversing the Oregon Supreme Court, without mentioning any presumption of prejudice. In *Smith v. Phillips*, 455 U.S. 209 (1982), and *Rushen v. Spain*, 464 U.S. 114 (1983), this Court considered the results of lower court hearings (conducted as required by *Remmer I*) and determined that new trials would *not* be required. Neither case referred to any presumption of prejudice. Indeed, *Smith v. Phillips* clearly suggested the absence of a presumption, stating that "[t]his Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." 455 U.S. at 215 (citing *Remmer I*).

Thus, *Olano* is consistent with its predecessors in holding that "intrusion jurisprudence" has little to do with presumptions and far more to do with the right to a hearing in which "the ultimate inquiry" is to determine, as a factual matter, whether a jury's deliberations have been prejudiced. The approach of the courts below in this case fully satisfied that right.

B. Exxon's Purported Conflict among the Circuits Is Largely Semantic and Not Pertinent to the Outcome of This Case.

Contrary to the premise of Exxon's petition, every circuit would have reached the same conclusion after finding, as did the two courts below, that CSO Warrick's comment did not affect any juror's deliberations. Although different courts may use different language in approaching jury intrusion issues, all courts (like the courts below) engage in a fact-intensive analysis

designed to answer the "ultimate inquiry" set forth by this Court in *Olano*: "Did the intrusion affect the jury's deliberations and thereby its verdict?" *Olano*, 507 U.S. at 739. Given the determination of the lower courts on that "ultimate inquiry" here, the presumption that Exxon advocates (and that it claims would have applied in some circuits) would have no effect on the disposition of this case. The supposed conflict is largely illusory, academic at best, and does not require this Court's attention.

1. The Supposed Conflict Makes No Difference Here Because, Based on the Facts Found by the Courts Below, Every Circuit Would Decide This Case in the Same Way.

Like the courts below in this case, all circuits follow *Remmer*'s admonition that a hearing generally is required to investigate the circumstances and impact of an improper jury contact. Even where a court formally begins with a presumption of prejudice, the point of the hearing is to replace the bare presumption with the facts necessary to make the decisive determination whether, as a factual matter, a particular intrusion has had an impact on the jury's deliberative process.

Here, the facts have been found by two lower courts and are no longer subject to debate in this Court. *See Goodman*, 482 U.S. at 665; *Graver Manufacturing*, 336 U.S. at 275. Thus, it must be taken as given that Warrick's bullet remark was both made and understood as "a tasteless joke," that it "did not adversely affect Graham's deliberations or coerce any other juror," that no other jurors, with the possible exception of the foreman, even

learned of the incident, and that the remark "did not influence the jury's deliberations."[8] Pet. App. 4a, 5a, 9a, 54a; Supp. App. 24 n.18. On these facts, there can be no serious contention that the decision in this case conflicts with any decision of any other court of appeals. Indeed, courts (including those that recognize a presumption of prejudice) have frequently denied motions for a new trial when comments have been made to or by jurors in jest, even when those comments have improperly suggested the result the jury should reach or that the jury should return a verdict quickly – neither of which happened here.[9] Exxon has cited no case where any court of appeals

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[8] In rearguing these findings, Exxon relies (as it did below) on the suggestion that Warrick's comment contained an improper *implicit* message that he was "not on Mrs. Wilson's 'side' in the jury's deliberations." Pet. 28. The district court specifically rejected Exxon's interpretation of events, noting that "neither the CSO, nor anyone else knew the opinion" of Ms. Wilson. Supp. App. 23. Further, the testimony negates Exxon's suggestion. When Exxon's counsel tried to lead Mr. Graham into saying that Warrick was "disapproving" of Mrs. Wilson, Graham responded: "Well, I really wouldn't say that. I really wouldn't say that." SER 144:1-6.

[9] Such cases from circuits that, according to Exxon, consistently apply a presumption of prejudice include *Port Terminal & Warehousing Co. v. John S. James Co.*, 695 F.2d 1328, 1340-41 (11th Cir. 1983) (purported bribe offer), *United States v. Caporale*, 806 F.2d 1487, 1502 (11th Cir. 1986) (juror told jury he received regular "reports" on case from "Mafia" friends), and *Evans v. Young*, 854 F.2d 1081, 1082-84 (7th Cir. 1988) ("Hang him"). Cases from other circuits involving misguided jokes include *United States v. DiSalvo*, 34 F.3d 1204, 1225-26 (3d Cir. 1994) (juror joked that defendant "will put his men on you"), *United States v. Armstrong*, 909 F.2d 1238, 1240, 1244 (9th Cir. 1990) ("He's guilty"), *United States v. Norton*, 700 F.2d 1072, 1076

has ordered a new trial despite finding that an intrusion had no impact on the jury's deliberations.

Whether one regards the presumption advocated by Exxon as merely operating "[i]n the absence of evidence to the contrary," *United States v. Pennell*, 737 F.2d 521, 539 (6th Cir. 1984) (Celebrezze, J., dissenting), so as to affect only the burden of going forward with the evidence, *see, e.g.*, Fed. R. Evid. 301 (presumptions in civil cases affect only the burden of going forward), or the burden of persuasion, *see, e.g.*, *United States v. Cheek*, 94 F.3d 136, 141 (4th Cir. 1996),[10] any presumption would have been dispelled by the evidentiary inquiry and subsequent factual findings of the two courts below. The outcome of this case thus would not be affected by refinement of the circumstances, if any, under which a presumption of prejudice might apply prior to the entry of factual findings on a full evidentiary record.

(6th Cir. 1983) ("Just be sure you make the right choice"), *United States v. Pecora*, 693 F.2d 421, 424-25 (5th Cir. 1982) (prank call), *United States v. Albert*, 595 F.2d 283, 290 (5th Cir. 1979) ("It shouldn't take you long to reach a verdict"), and *DeRonde v. State*, 715 P.2d 84, 86 (Okla. Ct. App. 1986) ("you know they're guilty or they wouldn't be there").

[10] Even where a trial court applies an erroneous burden of persuasion, an appellate court will reverse only if the evidence is "in sufficient balance so that the outcome would depend on who had the burden." *Barth v. Gelb*, 2 F.3d 1180, 1188 (D.C. Cir. 1993). Here, the emphatic findings of the two courts below make clear that the evidence was *not* in balance.

2. Like This Court in *Olano*, the Circuits Have Recognized the Practical Insignificance of the Presumption Advocated by Exxon.

Whether they invoke a presumption of prejudice or not, the cases in all circuits ultimately (and properly) turn on the facts. As the D.C. Circuit has explained:

> Although often referring to *Remmer*, this court has in fact not treated the supposed "presumption" as particularly forceful, but rather has accepted the necessity of focusing on the specific facts of the alleged contact, and, as a result, has found broad discretion in the trial court to assess the effect of alleged intrusions.

United States v. Williams-Davis, 90 F.3d 490, 496-97 (D.C. Cir. 1996). *See also United States v. Armstrong*, 654 F.2d 1328, 1332 (9th Cir. 1981) ("whether or not we speak in terms of the rebuttable presumption of prejudice or the fairness of the defendants' trial, we reach the same result"). Put another way, in practice the courts of appeals heed this Court's direction to focus their inquiry not on presumptions or other legal constructs, but on the ultimate factual determination of whether "the intrusion affect[ed] the jury's deliberations and thereby its verdict." *Olano*, 507 U.S. at 739. *See United States v. Tucker*, 137 F.3d 1016, 1030 (8th Cir. 1998) ("whether the presumption shifts the burden of proof to the government or not, the ultimate question is the same") (citing *Olano*).[11]

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[11] As Exxon concedes, some circuits that regularly invoke the *Remmer* presumption have declined to apply the presumption in some cases. Pet. 21-26 nn.7, 8, 9, and cases cited therein. *See also United States v. Gomes*, 177 F.3d 76, 83 (1st Cir.

Thus, opinions in those circuits that, according to Exxon, formally adhere to a presumption of prejudice commonly begin with a citation to *Remmer*, proceed through a recitation of the presumption, and then conclude with a fact-specific analysis in which deference to the trial court (not the existence of a presumption) plays the major role. *See, e.g., United States v. Aguirre*, 108 F.3d 1284, 1287 (10th Cir. 1997) (trial judge "uniquely able to assess the likelihood" of prejudice); *United States v. Butler*, 822 F.2d 1191, 1195-96 (D.C. Cir. 1987) (burden to dispel presumption "made less demanding by the trial judge's participation" in effort to ascertain extent of prejudice); *United States v. Weiss*, 752 F.2d 777, 783 (2d Cir. 1985) (trial judge did not abuse discretion in holding jury's use of accounting text to be harmless). In most of these cases, the courts have concluded that the presumption of prejudice has been overcome on the particular facts. *See, e.g., id.*[12] Indeed, in some cases, courts applying the presumption have found it overcome based simply on evidence of the intrusion itself, without the need for further inquiry. *United States v. Day*, 830 F.2d 1099, 1104 (10th Cir. 1987) (despite presumption, "the trial court, armed only with the undisputed content of the conversation . . . had an

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1999); *United States v. De la Vega*, 913 F.2d 861, 870 (11th Cir. 1990); *United States v. Bufalino*, 576 F.2d 446, 451 (2d Cir. 1978). These variations emphasize the fact-specific nature of the ultimate inquiry in intrusion cases.

[12] *See also Schaff v. Snyder*, 190 F.3d 513 (7th Cir. 1999); *United States v. O'Brien*, 972 F.2d 12 (1st Cir. 1992); *United States v. Sanders*, 962 F.2d 660 (7th Cir. 1992); *United States v. Angiulo*, 897 F.2d 1169 (1st Cir. 1990); *United States v. Doherty*, 867 F.2d 47 (1st Cir. 1989); *United States v. Hornung*, 848 F.2d 1040 (10th Cir. 1988); *United States v. Wiley*, 846 F.2d 150 (2d Cir. 1988).

adequate basis to find, as a matter of law, that no prejudice resulted"); *United States v. Pessefall*, 27 F.3d 511, 515-16 (11th Cir. 1994) (no hearing required where circumstances known to district court showed no reasonable possibility of prejudice); *Evans v. Young*, 854 F.2d 1081, 1082-84 (7th Cir. 1988) (testimony of third party sufficient when combined with polling of jury to dispel prejudicial impact of "thoughtlessly poor" joke).

In the circuits that do *not* invoke a presumption of prejudice (or that invoke a presumption only in certain circumstances), serious jury intrusions receive no less scrutiny than they do in other circuits. In *United States v. Maree*, 934 F.2d 196, 202 (9th Cir. 1991), for example, a friend of one juror discussed the case with the juror and conveyed "strong opinions concerning the proper outcome." Although the Ninth Circuit held that no presumption of prejudice applied, because the friend had not communicated any facts concerning the case, a unanimous panel ordered a new trial. Other courts likewise have ordered new trials based on the facts, even while rejecting application of a presumption of prejudice. *See, e.g., Waldorf v. Shuta*, 3 F.3d 705 (3rd Cir. 1993) (no presumption; new trial where jury saw media report of $30 million verdict in similar case); *Johnson v. Armontrout*, 961 F.2d 748 (8th Cir. 1992) (no presumption; new trial where jurors had extraneous knowledge from related trial).[13]

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[13] These cases refute Exxon's claim that, without a presumption, Fed. R. Evid. 606(b) would make it impossible to prove prejudice, especially where the conduct at issue is "objectively *not* likely to influence the verdict." Pet. 16-17 (emphasis in original). This Court has said that "[t]he substance of the ex parte communications and their effect on juror

Further, in some circuits where the presumption does not uniformly apply, it does arise if the court finds a likelihood that the intrusion had an effect on the deliberations, *see, e.g., United States v. Sylvester*, 143 F.3d 923, 933-34 (5th Cir. 1998), or if the intrusion falls into a particularly suspect category, *see* Pet. App. 7a-9a. Thus, because the result of the ultimate inquiry is the same whether serious jury intrusions are subject to an automatic presumption, a presumption that arises upon a showing of likely prejudice, or simply close examination, it is not surprising that several decisions have noted that, on the facts, application of a presumption of prejudice would have no impact on the disposition of the appeal.[14]

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impartiality are questions of historical fact," to which a juror may testify without running afoul of Rule 606(b). *Rushen*, 464 U.S. at 120-21 n.5. In any event, Exxon's concern makes no sense. Even *with* a presumption of prejudice, a new trial would be highly improbable in the case of an objectively non-prejudicial intrusion: as Exxon elsewhere admits, an inference of prejudice properly can be dispelled by objective evidence, sometimes without an evidentiary hearing. *See* Pet. 27 n.11. Exxon points to no case in which the presumption has been invoked to require a new trial where the intrusion was "objectively *not* likely to influence the verdict."

[14] *See, e.g., United States v. Blumyer*, 62 F.3d 1013, 1017 (8th Cir. 1995) ("even if the presumption of prejudice had been warranted . . . the government overcame the presumption"); *United States v. Estrada*, 45 F.3d 1215, 1228 (8th Cir. 1995) (district court and court of appeals reached same conclusion using different standards); *United States v. Gilsenan*, 949 F.2d 90, 95 n.7 (3d Cir. 1991) ("even if there was such a presumption, it was rebutted by the overall facts here"); *United States v. Boylan*, 898 F.2d 230, 262 (1st Cir. 1990) ("even if a *Remmer*-type presumption had come into play, it would be overcome by cogency of the [trial court's] findings"); *United States v. Angiulo*,

The conclusion that a presumption has no outcome-determinative consequences finds further support in analysis of the forty cases that Exxon has cited to illustrate the supposed circuit split. Pet. 21-27. The courts granted a new trial due to jury issues in only ten of those cases, and not one such grant appears to have turned on the application of any presumption of prejudice. The ten include three cases from the court below, including *Maree*, thus demonstrating that the Ninth Circuit's approach to jury intrusions accommodates new trials where the facts warrant. *See United States v. Dutkel*, 192 F.3d 893 (9th Cir. 1999); *United States v. Littlefield*, 752 F.2d 1429 (9th Cir. 1985). *See also Rinker v. County of Napa*, 724 F.2d 1352 (9th Cir. 1983) (cited at Pet. 15). Of the remaining seven cases, one granted a new trial despite an express finding that no presumption of prejudice applied, *Waldorf*, 3 F.3d at 710-11 n.6; two came from a circuit in which there must be an initial showing that the intrusion was "more than innocuous" before a presumption is invoked, *United States v. Cheek*, 94 F.3d 136 (4th Cir. 1996); *Stephens v. South Atlantic Canners*, 848 F.2d 484 (4th Cir. 1988); and the remaining four came from three different circuits that generally invoke the presumption. *Owen v. Duckworth*, 727 F.2d 643 (7th Cir. 1984); *Mayhue v. St. Francis Hospital of Wichita, Inc.*, 969 F.2d 919 (10th Cir. 1992); *United States v. Scisum*, 32 F.3d 1470 (10th Cir. 1994); *United States v. Martinez*, 14 F.3d 543 (11th Cir. 1994). Exxon's cases thus provide no empirical basis for concluding that findings on the ultimate inquiry differ depending on whether a

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897 F.2d 1169, 1184-85 (1st Cir. 1990) ("resolution of defendant's allegation does not turn on" the presumption).

court invokes a presumption of prejudice before it begins its factual analysis.

In the end, Exxon's argument that the presumption has substantive consequences rests on a single Sixth Circuit case, in which this Court denied certiorari. *United States v. Pennell*, 737 F.2d 521 (6th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985), cited at Pet. 27. But Exxon exaggerates the impact of the presumption in *Pennell*. Although the *Pennell* court did say that it would be "hard pressed to affirm" "were *Remmer*, *Ferguson* and *Stone* [two rejected Sixth Circuit cases] controlling," it based that comment largely on the fact that the Sixth Circuit cases had "exhibited a distrust of juror assurances of impartiality." 737 F.2d at 532. *Pennell* determined that this Court's decision in *Smith v. Phillips* gave it freedom to "rely upon such assurances" in ascertaining the impact of a jury intrusion, 737 F.2d at 533, and therefore found that assurances of impartiality provided by the potentially tainted jurors were dispositive. 737 F.2d at 534.

In any event, the question presented by the petition is not whether the *Pennell* court thought it was in conflict with a presumption rule. Rather, the question is whether there is a conflict as to an issue that could be dispositive of this case, and there is none. A survey of the cases shows that the circuits' varying formulations of the so-called "presumption of prejudice" make no difference in the ultimate inquiries, which turn on the facts. Accordingly, Exxon has presented no issue worthy of this Court's assertion of jurisdiction.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondents

DATED: August 14, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re	)	
the EXXON VALDEZ	)	
	)	No. A89-0095-CV
This Order Relates	)	(HRH) (Consolidated)
to All Cases	)	
	)	

ORDER No. 308

Exxon's Motion for a New Trial
(Juror Misconduct and Coercion)

(Filed Feb. 20, 1996)

Exxon Corporation (D-1) and Exxon Shipping Company (D-2) (Exxon) have filed a motion for a new trial based on possible juror misconduct and coercion.[1] Plaintiffs oppose the motion[2] and Exxon has replied.[3] Exxon's request for oral argument is deemed unnecessary and is denied.[4]

Exxon moves for a new trial on Phases I and III for the following reasons:

> (a) the jury improperly considered and discussed extrinsic information relating to the convictions of Captain Hazelwood for driving under the influence of alcohol and/or the revocation or suspension of his driver's license,

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[1] Clerk's Docket No. 6448. Defendant Joseph Hazelwood joins in Exxon's motion. Clerk's Docket No. 6449.

[2] Clerk's Docket No. 6476.

[3] Clerk's Docket No. 6512.

[4] Clerk's Docket No. 6540.

despite the Court's Order No. 207 excluding all such materials from evidence;

(b) Juror Moor was improperly approached about the case by one of the commercial fishing plaintiffs;

(c) acts of intimidation were directed at several jurors;

(d) the Court's instructions and contacts with Juror Wilson, taken in context and under all the circumstances, had the effect of coercing Juror Wilson into abandoning her honest convictions;

(e) a Court Security Officer engaged in an entirely improper course of conduct by communicating with Juror Graham concerning the jury's deliberations and taking sides against Juror Wilson;

(f) Juror Dean concealed material information on *voir dire* which, had it been revealed, would have provided a basis for a challenge for cause;

(g) any or all or [sic] the foregoing grounds, taken individually or collectively, require a new trial.

Motion at 1-2.

The court will consider the arguments *seriatim*.

Extraneous Evidence

Exxon argues that the jury was exposed to extraneous prejudicial evidence of Captain Hazelwood's DUI convictions and resultant driver's license revocations.

According to the transcript of the jury hearings[5] each of the jurors interviewed testified that they were not exposed to extraneous information about Captain Hazelwood and his driving record.[6] The court is convinced that the jurors were not exposed to extraneous information about Captain Hazelwood.

The court is also convinced that the DUI information, which the court excluded from the evidence, was not a part of the evidence which came before the jury. According to the affidavit of Lois Soiffer, a legal assistant for Bogle & Gates, none of the excluded information was in either the daily trial transcripts or any exhibit admitted into evidence.

The jury was not, during the trial or deliberations, exposed to the excluded information through extraneous sources or through the evidence. It is obvious, therefore, that the jurors who testified that they knew of Hazelwood's driving record during the trial were confused.[7]

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[5] Clerk's Docket No. 6381 and No. 6383.

[6] Jury Hearing Transcript at 9-10 (Dean); 47-48 (Moor); 74-75, 81 (Provost); 97 (Garrison); 109-10, 119 (Spann); 131-32 (Graham); 158-60 (Smith); 177, 184-85 (Hood); 193-94 (Johnson) 209-10 (Murray).

[7] The jurors' knowledge of Hazelwood's driving record can be divided into three categories: (1) a few jurors were unaware of Hazelwood's driving record; (2) a few jurors were aware of Hazelwood's driving record but were uncertain about when they learned of it; and (3) a few jurors testified that they learned of Hazelwood's driving record from the evidence. As the Soiffer affidavit proves, the latter scenario is impossible. Moreover, *all* of the jurors testified that they did not learn of Hazelwood's driving record from extraneous sources. Hence, the only logical

They may have learned of Hazelwood's driving record either before or after the trial, but the jurors' testimony and Soiffer affidavit verify that they were not exposed to the excluded information during the trial.

Juror Moor

Exxon next argues that Juror Moor was improperly approached about the case by one of the commercial fishing plaintiffs. During the jury hearing, Juror Moor testified as follows:

> Q. . . . During the course of the trial, did anyone ever attempt to convey information to you about the case outside of the courtroom?
>
> A. No. I did have a young man who I later found out was a fisherman come up to me one night, this was a young man, say, *Hey, honey how we doing*, and I said, I don't know you. He went on about his business. But other than that, that's – that's the only – it was kind of a humorous thing. And he meant it to be humorous at the time, I feel.
>
> Q. Did he know that you were one of the Exxon jurors?
>
> A. He knew I was on the jury, it was well into the case. And they're people that we meet on occasion, but until that particular time I didn't realize this young man was a fisherman.
>
> Q. Oh, this was someone you knew from before?

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conclusion is that a few jurors were confused about their knowledge of Hazelwood's driving record.

> A. He's a personal friend – well, not a personal friend. I know his wife. But I guess I never really was too concerned about what he did for a living. He was delivering our papers for a while and that sort of thing.
>
> Q. Did he endeavor to convey any information?
>
> A. Never a word, and he hasn't said anything since. He hasn't contributed anything since, you know, as to what's going on.

Jury Hearing Transcript at 42 (emphasis added).

Exxon argues that the statement "Hey, honey, how we doing":

> [W]as plainly calculated to curry favor with Juror Moor and, perhaps more important, to make sure she knew that one of her friends had a financial interest in the outcome of the trial. This presumptively prejudicial error was compounded by Juror Moor's own misconduct in violating the Court's instructions . . . and failing to report the man's wrongdoing until questioned by the Court a year or so later.

Memorandum in support of motion at 10 (citations and footnotes omitted).

Exxon seeks to make much out of very little. Exxon argues that the individual who spoke to Juror Moor was a commercial fishing plaintiff or a commercial fishing class member. Juror Moor, however, simply identified that individual as a "fisherman." There is no reason to speculate that the individual was a commercial fishermen [sic], let alone a plaintiff or class member.

Exxon argues that the fisherman was "friend" who wanted to make sure that Juror Moor knew of his financial interest in the trial. Juror Moor testified that the fisherman was "*not* a personal friend," and there is no evidence that the fisherman had any interest, let alone a financial interest in the trial. Jury Hearing Transcript at 42 (emphasis added).

Exxon argues that Juror Moor committed misconduct by not reporting the fisherman's "wrongdoing" until "a year or so *later*." Memorandum in support of motion at 10 (emphasis added). Even if the fisherman had committed "wrongdoing", Juror Moor testified that she did not know he was a fisherman until "later." Jury Hearing Transcript at 42. Thus, there is nothing to suggest that Juror Moor failed to notify the court of a "wrongdoing" during the trial.

Finally, Exxon argues that the fisherman's statement "Hey, honey, how we doing" was "plainly calculated to curry favor with Juror Moor. . . . " Memorandum in support of motion at 10. Perhaps so, but not in the manner which Exxon suggests. In any event, the entire conversation was completely and utterly harmless.[8]

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[8] Exxon compares the statement made to Juror Moor with *Rinker v. County of Napa*, 724 F.2d 1352 (9th Cir. 1983), in which Rinker approached a juror as she returned to the jury room and told her that if she had any questions about the case, he would be glad to answer them for her. The situation in the case at bar simply has no comparison to *Rinker*.

Acts of Intimidation

Next, Exxon argues that acts of intimidation were directed against several jurors. According to Exxon, these acts of intimidation include dead salmon found in Juror Johnson's yard the morning after the Phase IIA verdict.

Juror Johnson testified that the fish were left in her driveway, not her yard, and she was uncertain as to when it happened. She testified that the incident occurred:

> Probably in part of Phase II, maybe. It was when they were giving fish out on the street, you know, the salmon they were giving, the free salmon, and it was like a day after that. And I thought, well, maybe they just got that for the fishing and threw it out there. There was like three of them out on my driveway and I thought if anything else happened, I'd like – you know, but that didn't scare me.

Jury Hearing Transcript at 195.

Contact with a juror invalidates a verdict "unless the harmlessness of the contact is shown." *Hobson v. Wilson*, 737 F.2d 1, 47 (D.C. Cir. 1984) (citing *Mattox v. United States*, 146 U.S. 140 (1892), *cert. denied*, 470 U.S. 1084 (1985). It cannot be determined whether anyone associated with the trial left the fish, or if they knew that Ms. Johnson was a juror. Given that the event occurred at the time when salmon was being given away, the incident was probably random and not an attempt at intimidation. Additionally, a review of the transcripts reveals that the incident had no prejudicial effect on Juror Johnson or any other juror. The court finds that the incident was harmless and not prejudicial.

The second attempt at intimidation involved fish left at the home of Juror Wilson. According to Juror Wilson's husband, a whole fish was left in the driveway and on another occasion, a fish head and tail were found in the yard. Mr. Wilson related the incident as follows:

> I'm sure if you found that – it's never happened before and you're having a trial about fish and you end up with a fish in your driveway, you've got to give some thought to maybe wonder, you know, which way are they wanting, you know, from what side is this pressure coming, but she didn't mention how she felt about it one way or the other about that.

Jury Hearing Transcript at 235-36.

The court finds that the Wilson fish incident was harmless. The fish cannot be attributed to either party, had no bearing on the merits of the case, and, according to the Jury Hearing Transcript, had no influential or prejudicial effect on Juror Wilson or any other juror.

The next attempt at intimidation involved Juror Wilson's car. Mr. Wilson testified that someone had "rummaged around" in the car and left cigarettes in the ashtray. *Id.* at 236. Mr. Wilson testified that the incident "didn't have anything to do with the trial or anything . . . " *Id.* The court finds that the incident was harmless and had no prejudicial effect on Juror Wilson or the other jurors.

Finally, Exxon argues that Juror Johnson reported "weird phone calls" and the Juror Murray felt his family was being watched. *Id.* at 200, 211.

Juror Johnson testified to nothing more than "somebody was getting weird phone calls." *Id.* at 200. She knew nothing more about the calls. The court finds that the phone calls were harmless and had no prejudicial effect on the jury.

Regarding Juror Murray's feelings that he was being watched, he testified as follows:

> Well, the only other incidences for me personally for being, I perceived it, my family under great scrutiny. I always saw people out, parked outside my home or whenever I took a walk, there were telephones. Fortunately, our kids were out of school and my wife could watch them. Otherwise I would have had a tremendous concern, them in public school, being watched. There were other people that were there that had not been there that I noticed.
>
> I live in a fairly quiet neighborhood, I know everybody. I think there was a lot of restrain [sic] on my time and mental capacity to make sure that they were not being influenced by anyone or anyone bothering them. So we had some concerns as a family how everybody was doing.

Id. at 211-12.

The court finds that the incident was harmless and had no prejudicial impact on either Juror Murray or the other jurors. If someone was watching Juror Murray, that person or persons cannot be identified with either side and the incidents did not interfere with the jury in any manner.

None of the incidents, whether taken separately or together, had the slightest effect on the jury. None of the incidents can be attributed to any person interested in the litigation and all of the incidents were harmless and were not prejudicial.[9]

Juror Wilson

Next, Exxon argues that Juror Wilson was coerced into abandoning her sincere convictions. The court will briefly discuss the relevant facts.

The trial began on May 2, 1994, and on September 2, 1995, "Juror Wilson was discovered outside the jury room 'in some emotional distress . . . obviously quite distraught . . . [and] sobbing.' " Memorandum in support of motion at 15 (citation omitted). The court then stepped into the jury room and stated to the jurors that the court "would try to take care of it after the long [Labor Day] weekend. . . . " Jury Hearing Transcript at 82.

On the Tuesday following the Labor Day weekend, the Court called the jury in and delivered Supplemental Instruction A. The text of Supplemental Instruction A is two pages long and need not be repeated here. In substance, the jury was instructed to impartially consider the evidence, to decide the case based on their own convictions, and to treat each other with common courtesy.

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[9] Exxon argues that the jurors' failure to report the incidents to the court exacerbates the resulting prejudice. The court finds, however, that incidents were so harmless and non-threatening as to make it unnecessary for the jury to report them to the court.

A few hours later, the court received a note from the jury stating:

> After reviewing the Supplemental Jury Instruction No. A. The Jurors have consulted with each other and we have reached a [sic] impasse. We request further instructions from the Court at this point.

Memorandum in Support of Motion, Exhibit B.

The court called the jury back in and delivered Supplemental Instruction B. This instruction stated in pertinent part:

> Given the complexity and duration of this case, as well as the divergence of positions between the parties, it is not surprising that individual jurors might, at this stage of your deliberations as to Phase III, have divergent views about the case. . . .
>
> . . . I suggest that you review all of my Phase III instructions and review all of the evidence which these instructions suggest will be relevant to a determination of the punitive damages issues before you. I suggest that you focus upon the issues or matters which divide you. It may very well be useful for purposes of your deliberations to review each individual matter and evaluate, to the extent possible, how each matter might affect your answer to one or the other of the two interrogatories posed as to each of the two defendants.
>
> You may be as leisurely in your deliberations as the occasion may require, and should take all the time which you may feel necessary.

Clerk's Docket No. 5890.

Exxon argues that Supplemental Instruction B was an *Allen* charge which coerced Juror Wilson because it omitted any reminder that jurors were to 'be nice' to one another and failed to remind the jurors that they were not to surrender their sincere convictions. According to *United States v. Mason*, 658 F.2d 1263, 1268 (9th Cir. 1981), failure to remind the jurors of their duty not to surrender their conscientiously held beliefs simply to secure a verdict, might be construed by the jurors as coercive.

Exxon's argument fails for several reasons. First, Supplemental Instruction B was not an *Allen* charge. As the court stated to counsel prior to giving the instruction, "the prudent thing to do at this point is to ignore the suggestion that there might be an impasse, to if you will, save the *Allen* chip for a later time, and see what a very soft instruction brings for us this morning." Trial Transcript, Vol. 46 at 7688, Clerk's Docket No. 5803.[10] Second, Supplemental Instruction B encouraged the jurors to review the Phase III instructions, which instructed the jurors not surrender their beliefs.[11] Third, Supplemental Instruction B was not even a "de facto *Allen* charge", *Jiminez v. Meyers*, 40 F.3d 976, 980 (9th Cir. 1993), *cert. denied*, 116 S. Ct. 63 (1995), because it did not instruct the

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[10] A typical *Allen* charge speaks specifically to the minority jurors and urges "the minority to consider the views of the majority, and ask themselves whether their own views were reasonable under the circumstances." *Lowenfield v. Phelps*, 484 U.S. 231, 237 (1988).

[11] In any event, instructing the jury not to surrender their convictions is required only when necessary to counter-balance "excesses" in the *Allen* charge. *United States v. Mason*, 658 F.2d at 1267. *See also Jiminez v. Meyers*, 40 F.3d at 981.

jury to "work towards unanimity and the minority to reexamine its views." *Id.* (citation omitted). Fourth, the court did not elicit any progression in the voting and was unaware of which direction the jury was moving. Finally, the court did not put any pressure on the jurors to reach a verdict, but instructed the jury to deliberate "leisurely." For the above reasons, the court finds that Supplemental Instruction B did not coerce Juror Wilson.[12]

The next event regarding Juror Wilson occurred on September 7, 1994, when the jury sent the following note to the court:

> We have reviewed your supplemental Jury instructions from Tuesday, September 6th, and Wednesday, September 7th. We have also reviewed the Jury instructions from Phase I, III. We have one Juror that we feel is emotionally unable to deliberate within the Jury instructions the court has provided. We have reached a crucial stage in our deliberation that has left us concerned about her emotional and physical health.

Memorandum in support of motion, Exhibit C.

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[12] "[T]he supplemental instruction . . . in no way suggested that a verdict was necessary, nor did it suggest that the jurors should surrender conscientious positions in light of the views of other jurors. The instruction spoke more to the style rather than to the substance of the deliberations. The charge at issue here was simply not of the potentially intimidating *Allen* type. . . ." *United States v. Knight*, 58 F.3d 393, 396 (8th Cir. 1995), *cert. denied*, No. 957218, 1995 WL 761800 (U.S. Jan. 22, 1996) (citations omitted).

The above note was sent at the end of the day after Juror Wilson had left the jury room. The following morning, September 8, 1995, the court ascertained from the jury foreman that Juror Wilson was the juror referenced in the note. The court asked Juror Wilson to come to chambers where she met with counsel and the court. The court read the note to Juror Wilson and informed her that on the previous day, her husband had visited the court to express his concerns about Juror Wilson's physical health.[13] The court then stated "[w]hat I would like to know at this point is *other than how the jury stands on anything*, are you ok?" Trial Transcript, Vol. 46 at 7697 (emphasis added). Juror Wilson responded "[i]'m just stressed out." *Id.* The following exchange ensued:

> The Court: Is there any concern from outside of this case or is there –
>
> Juror Wilson: No. It's just – it's just what happens in the jury room. I've never been in this kind of position, and it's – and I'm learning something every day on how to deal with it, but I tend – my health does go to pot when I get stressed out, and people that I haven't been around me don't realize that.
>
> The Court: Our concern is whether you are going to be okay continuing these deliberations.
>
> Juror Wilson: I feel really strongly that if I wasn't there I'd feel worse.

---

[13] Exxon argues that Juror Wilson was "shocked" that her husband had been to visit the court. That Juror Wilson was "shocked" was the impression of Juror Moor. Jury Hearing Transcript at 63. Neither Juror Wilson, nor her husband, expressed a similar sentiment.

The Court: That if you weren't there you'd be worse?

Juror Wilson: Yeah.

The Court: Okay. Is it – and I don't want to put words in your mouth now, but is it fair to say that you feel up to going on with the deliberations?

Juror Wilson: I feel like it's my duty to. I feel like I have to stick it out.

The Court: Will you let us know if there should come a point where you are having some kind of a health problem.

Juror Wilson: Yeah.

The Court: The last thing we want is for there to be – you know, this process must not physically or emotionally damage you; we don't want that to happen.

Juror Wilson: In some ways it's too late. I feel really strong and I have to be there, I feel like that I make a difference.

Id. at 7697-98.

Juror Wilson was sent to the jury room and the court expressed its satisfaction "that there is some tough debating going on in there, and I don't see any cause for our doing anything other than let the deliberations take their course, whatever that may be at this point." *Id.* at 7699. Regarding the meeting of jurors after Juror Wilson departed the previous day, the court stated, "[a]t this point I don't have any reason to believe that anything happened other than that this note was written after somebody, presumably Mrs. Wilson, left yesterday." *Id.*

Exxon argues that considering the totality of the circumstances, there was a clear coercive effect on Juror Wilson. Exxon argues that the jury met improperly, identified Juror Wilson as the source of its problems, and implied that a minority juror prevented a verdict. Exxon argues that Juror Wilson was singled out and the object of implicit criticism in the court's decision to interview her. Exxon argues that Juror Wilson believed that the court valued avoiding an impasse more than adherence to convictions. Exxon argues that the court approved of the jurors meeting without her and that the court endorsed the other juror's [sic] view that Juror Wilson was "the problem."[14] Memorandum in support of motion at 19.

Exxon argues that based on the totality of the circumstances, the coercive effect of the above sequence is obvious. *Lowenfield v. Phelps*, 484 U.S. at 237. In *Lowenfield*, the Court stated that a "review of petitioner's contention that the jury was improperly coerced requires that we consider the supplemental charge given by the trial court

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[14] Exxon argues that identification of Juror Wilson as a minority juror outside the privacy of deliberations is coercive itself. *Brasfield v. United States*, 272 U.S. 448 (1926); *Jordan v. United States*, 22 F.2d 966 (9th Cir. 1927). The cases upon which Exxon relies refer to situations in which the court elicits "the division of opinion among the jury." *Jordan*, 22 F.2d at 967. Even though the jury revealed that Juror Wilson was having emotional problems, the jury did not reveal any jurors' opinion. One cannot be a minority juror unless the jurors' opinions are known, and the court never inquired into how or if the jury was divided. In any event, the note regarding Juror Wilson did not suggest that her deliberations caused a deadlocked jury, rather, the note stated that she was "emotionally unable to deliberate . . . " Memorandum in support of motion, Exhibit C.

'in its context and under all the circumstances.' " *Id.* (citation omitted). Exxon has set out the factual circumstances in a dramatic flurry, yet the totality of the circumstances can be summarized as follows: The court issued two supplemental instructions which essentially encouraged the jurors to be civil towards one another and to keep working. The court investigated the jury's subsequent concern that Juror Wilson was emotionally unstable, and was satisfied that she could continue to deliberate. Nothing in the totality of the circumstances establishes that Juror Wilson was the victim of coercion.

Exxon argues that when Juror Wilson returned to deliberations, after her meeting with the court, "the majority jurors no longer felt the need to treat Juror Wilson fairly [and were surprised] that their improper effort to get rid of Juror Wilson failed." Memorandum in support of motion at 19-20 (citation omitted). Exxon's argument fails for two reasons. First, as noted above at note 13, a "majority" was never identified. Second, the jury's concerns about Juror Wilson's health should not be considered an "improper effort to get rid of [her]." Memorandum in support of motion at 20 (citation omitted).

Shortly after Juror Wilson returned to deliberations, she sent a note to the court stating, "I need to speak with you." Memorandum in support of motion, Exhibit D. The court met with Juror Wilson at the jury room door and told her that the court "could do nothing further at this time beyond telling her to follow the court's instructions." *Id.*[15] Exxon argues that the court failed to remind

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[15] At the jury hearing, the court stated that "in substance"

Juror Wilson not to abandon her convictions. However, it was unnecessary for the court to remind Juror Wilson not to abandon her convictions, because the court did not give Juror Wilson an *Allen* charge. *See supra* note 10. In any event, the court did instruct Juror Wilson to follow the court's instructions, which included an instruction not to abandon her convictions.

At this point, Exxon argues that Juror Wilson was "boxed in." Memorandum in support of motion at 20. Exxon's argument is based in the testimony of Juror Wilson's husband who stated:

> Her impression was that – that she felt somewhat penned up in all that, you know, felt, everybody does, I suppose, that a lot of your – some of your rights have been taken away and whatnot; that if she – if she chose not to come back, that they would put her in the jail downstairs and bring her up to deliberation during the day, house her down here, take her downstairs and bring her up during the day. She wouldn't have the freedom to go home at night.
>
> And that was one of her releases, her reliefs, was going home at night, so that – that was a concern. That was one of her impressions, was she would, you know, be here and she would never get out of here until the deliberations were over.

Jury Hearing Transcript at 254.

Juror Wilson asked "to be excused from the jury." Jury Hearing Transcript at 257.

Exxon argues that the court, by giving Supplemental Instruction B, "sent the message that fair treatment was secondary to avoiding an impasse." Memorandum in support of motion at 21. Exxon argues further that the court "sided with the other jurors in the view that [Juror Wilson] was the problem. . . . " *Id.* As a result, Exxon argues that Juror Wilson was afraid that she would be "locked up" and "put in jail" because she believed that the court *"required"* a verdict and did not want Juror Wilson to " 'make a difference.' " *Id.* at 21 n.21. Exxon argues that the court made it plain that Juror Wilson "would get no further help, and could not leave the jury." *Id.* at 21. Finally, Exxon argues that Juror Wilson's only "way out" was for her to sacrifice her honest convictions and to " 'join the crowd and sacrifice all her feelings [because] it was the only way she knew how to survive.' " *Id.* at 21-22 (quoting Exxon's Exhibit A at 11). Accordingly, Exxon argues that the verdict was not the result of conviction, but the product of suffering. *Arizona v. Washington*, 434 U.S. 497, 510 n.27 (1978) ("if a jury cannot agree . . . we ought not to coerce them by personal suffering, nor ought we to expose parties to the danger of a verdict which is not the result of conviction in the minds of the jury, but produced by suffering of mind or body.") (internal quotation and citation omitted).

Exxon's melodrama is an extraordinary and exaggerated account of the events. Supplemental Instruction B simply cannot be read as sending a "message that fair treatment was secondary to avoiding an impasse." Memorandum in support of motion at 21. The instruction simply encouraged the jurors to review the previous instructions and to continue leisurely deliberations.

Exxon argues that the court "sided with the other jurors," yet nothing in the evidence lends the slightest specter of support to Exxon's extraordinary claim. *Id.* Exxon transforms Juror Wilson's impressions of the drudgery of extended jury duty to a claim that she actually feared she would be jailed for the duration. The jury, of course, was not sequestered, and Juror Wilson went home at 2:00 p.m. every afternoon and stayed home on weekends and holidays. The court does not doubt that the *Exxon* jury duty was grueling and bears a comparison to being "somewhat penned up," but the rigors of prolonged jury duty do not amount to coercion. Jury Hearing Transcript at 254. Exxon argues that the court, in meeting with Juror Wilson made it plain that she would get no further help and could not leave the jury. The court, however, simply told Juror Wilson that there was nothing it could do "at this time." Memorandum in Support of motion, Exhibit D. The court did not inform Juror Wilson that she could get no further help and could never leave the jury. Exxon argues that Juror Wilson sacrificed her honest feelings "because [i]t was the only way she knew how to survive." *Id.* at 22 (quoting Exhibit A at 11). Yet Juror Wilson stated that it was her "duty" to continue deliberating, she felt she had "to be there" and believed she could "make a difference." Trial Transcript, Vol. 46 at 7698. Moreover, after the court told Juror Wilson, on September 8, 1994, that she should review the instructions, she continued to deliberate for another six days until the jury reached its verdict.[16] The length of deliberations demonstrates a lack

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[16] Obviously, the fact that the jury continued to deliberate belies Exxon's assertion that the jury was at an impasse.

of coercion. *See United States v. Cuozzo*, 962 F.2d 945, 952 (9th Cir.), *cert. denied*, 506 U.S. 978 (1992) (deliberation of six hours following an Allen charge "was not of such short duration as to raise a suspicion of coercion.").

After Juror Wilson returned to deliberations on September 8, 1994, the jury requested further evidence and exhibits from the court. The facts of the case are indicative of a jury working carefully and deliberately in reaching its verdicts. Nothing in the record reflects that Juror Wilson or any other juror was coerced or pressured into returning the verdicts. As stated in *United States v. Knight*, 58 F.3d at 396, "[j]ury duty can be unpleasant, but difficult, one-sided debate in the jury room does not require a mistrial. '[I]ndividual jurors have no right to be released from their colleagues' efforts at persuasion.' " *Id.* (citation omitted).[17]

The court finds that Exxon's arguments regarding coercion of Juror Wilson do not provide grounds for a new trial.

Juror Graham and the Court Security Officer

Next, Exxon argues that coercive communication between a Court Security Officer (CSO) and Juror Graham requires a new trial. Juror Graham testified at the

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[17] Assuming an *Allen* charge had been given, the coercive effect is evaluated on the basis of: (1) the form of the instruction; (2) the period of deliberation following the *Allen* charge; (3) the total time of jury deliberations; and (4) any indicia of coerciveness or pressure upon the jury. *United States v. Wauneka*, 842 F.2d 1083, 1088 (9th Cir. 1988) (citation omitted). Here, all of the factors demonstrate a complete lack of coercion.

jury hearing that one morning when he arrived for deliberations, a CSO motioned to him and stated that he heard the jury was having problems with Juror Wilson. According to Juror Graham, the CSO then pulled out his gun, removed a bullet, and said "maybe if you put her out of her misery or something." Jury Hearing Transcript at 141. The CSO then acted as if he wanted Juror Graham to take the bullet. *Id.* at 142. Juror Graham was "totally freaked . . . out." *Id.* He did not believe that he told anyone except, perhaps, the jury foreman. *Id.* The CSO denied involvement in the incident. Jury Hearing Transcript at 268-69. The court is not convinced that the incident ever occurred. *Assuming arguendo* that it did occur, the incident does not warrant a new trial.

Exxon compares this case with *United States v. Maree*, 934 F.2d 196 (9th Cir. 1991), in which a juror discussed all the trial evidence with her friends who then recommended that the juror find defendant guilty. The court stated that such *ex parte* contacts warrant a new trial only if the court finds actual prejudice to the defendant. *Id.* at 201. The court found that because the juror was presented with strong and aggressive opinions about the outcome of the case, the defendant suffered actual prejudice.

Exxon argues that:

> There can be few situations where a juror is *more* "aggressively" confronted with "opinions concerning the proper outcome of [the] case," than when a court security officer calls a juror over for an *ex parte* conversation, pulls out his gun, offers the juror a bullet, and suggests to him that a minority juror should be "put out of her misery."

Reply at 19 (citations omitted).

Exxon's argument fails for two reasons. First, the CSO did not mention the case, did not mention Exxon or commercial fishermen, and did not mention recklessness or punitive damages. Simply put, the CSO did not express an opinion about the outcome of the case. Second, Exxon continues to labor under the misconception that Juror Wilson was known to be a "minority" juror. Juror Wilson was not a "minority" juror merely because she was the only juror to exhibit emotional strain. A minority juror, as noted above, is one whose opinion is different from that of the other jurors. Here, neither the CSO, nor anyone else knew the opinion of a single juror.

No one outside the jury room was ever aware of Juror Wilson's opinion, they only knew that she was very upset during the final days of deliberations. Thus, the CSO could not have "taken sides" against Juror Wilson, because he had no idea what "side" she was on. Reply at 20. The CSO did not express his opinion about the trial or deliberations, he did not actively discuss the case, and he did not present extraneous evidence to the jury. The CSO did not comment about Exxon or the commercial fishermen, he commented about a juror. If the incident took place as Juror Graham testified, then the CSO exercised incredibly poor judgment, but such foolishness would not warrant a new trial.[18]

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[18] Exxon compares this case to several inapplicable cases. The factual differences demonstrate why a new trial was warranted in the cited cases, but not in the case at bar. In *Parker v. Gladden*, 385 U.S. 363 (1966), in which a bailiff said to jurors, "Oh, that wicked fellow [petitioner] he's guilty . . . [i]f there is

Juror Dean

Finally, Exxon argues that a new trial is warranted because Juror Dean answered "no" to the following question on the juror questionnaire: Have you, any member of your family, or any close friend, ever had an alcohol or drug abuse problem? *See* Order No. 295 at 2 n.4, Clerk's Docket No. 6431.

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anything wrong [in finding petitioner guilty] the Supreme Court will correct it." *Id.* at 363-64. In *Parker*, it is obvious that the bailiff expressed an opinion about the case; in the case at bar, the CSO did not express his opinion.

In *People v. Hedgecock*, 51 Cal. 3d 395, 272 Cal. Rptr. 803, 795 P.2d 1260 (1990), the bailiff stated that sequestration was expensive and that jurors should reach a quick verdict. The bailiff provided alcohol to the jurors, asked one juror to take notes on what unreasonable jurors were saying, and expressed his opinion on the meaning of reasonable doubt. In *United States ex rel. Tobe v. Bensinger*, 492 F.2d 232 (7th Cir. 1974) , the bailiff made a comment " 'akin to an *Allen* charge' " when he told the jurors to keep deliberating until they reached a decision, without telling them not to relinquish their convictions. *Id.* at 238 (citation omitted). Similarly, in *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973), the marshal told the jury that the judge could make them deliberate as long as he wanted and told the jury to remember the judge's instructions. The marshal also told the jury not to expect to reach a quick verdict. In *Scott v. Commonwealth of Virginia*, 11 Va. App. 516, 399 S.E.2d 648 (1990), the bailiff made several comments about the leniency of juries in Richmond. Finally, in *State of Louisiana v. Duplissey*, 550 So.2d 590 (La. 1989) , the bailiff told the foreperson that the jurors were to show an illiterate juror how to vote.

In each of the above cases, the bailiff had a direct and prejudicial impact on deliberations. In the case at bar, however, the CSO's alleged actions were not directed toward and did not influence the jury's deliberations.

Exxon argues that Juror Dean's arrest for possession of marijuana and frequent marijuana use is proof that he had a drug abuse problem. Both Exxon and plaintiffs have submitted expert opinions on whether Juror Dean had a drug abuse problem. Exxon's expert, of course, states that Juror Dean had a serious drug problem. Plaintiff's expert, on the other hand, states that there is insufficient data to assert whether Juror Dean had a drug abuse problem.

The court finds that Juror Dean answered the question correctly. Juror Dean has never been diagnosed with a drug abuse problem and the court cannot reach a contrary conclusion based upon the experts' affidavits.

Conclusion

For the above stated reasons, Exxon's motion for a new trial is denied.[19]

DATED at Anchorage, Alaska, this 19 day of February, 1996.

/s/ H. Russel Holland
H. Russel Holland,
Chief Judge
District of Alaska

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[19] Plaintiffs' motion to strike certain statements, exhibits, and transcript citation is denied as moot. Clerk's Docket No. 6517.

(3)

Supreme Court, U.S.
FILED
SEP 1 2000

No. 00-90

IN THE

Supreme Court of the United States

EXXON MOBIL CORPORATION, *et al.*,
Petitioners,

v.

GRANT BAKER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

To explain the need for review of the question presented here – *viz.*, whether this Court's decisions in *Mattox v. United States*, 146 U.S. 140 (1892), and *Remmer v. United States*, 347 U.S. 227 (1954), holding that improper ex parte contacts with a jury establish a rebuttable presumption of prejudice, remain good law – the petition for certiorari established four important points:

First, the federal circuits have expressed directly conflicting views on the question presented. Respondents do not dispute that point at all. *Second*, the lower courts refused to apply any presumption of prejudice to CSO Warrick's "bullet remark" to juror Graham, but instead required ExxonMobil to prove "actual" coercion. Respondents do not dispute that point at all. *Third*, Warrick's remark was an egregiously improper ex parte contact that would establish a rebuttable presumption of prejudice in the circuits that continue to apply *Mattox* and *Remmer*. Respondents do not dispute that point at all. *Fourth*, the question whether the presumption established by *Mattox* and *Remmer* should have been applied is important in that its answer could affect both the outcome below, and countless future cases.

It is only the final point with which respondents take issue in their brief in opposition. Respondents contend that this case, and every other case involving improper jury contacts, simply "turns on the facts" no matter what legal rule is applied, and therefore what is at issue is a factual finding not worthy of review by this Court.

Respondents are wrong. To begin with, they ignore the settled rule that any finding of fact "that is predicated on a misunderstanding of the governing rule of law" is legal error subject to plenary review and correction by this Court. *Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485, 501 (1984). Respondents do not even attempt to deny that the lower courts' "factual finding" that the jury in this case was not

"actually coerced" was predicated on a governing rule of law that directly conflicts with the rule enunciated in *Mattox* and *Remmer*. And if any case shows why the right rule matters, it is this case. Respondents' own brief further proves why the question of the continued validity of the *Mattox/Remmer* presumption is one of substantial importance in the administration of justice in the federal courts: respondents' catalogue of all the cases cited in the petition establishes that federal courts of appeals reverse jury verdicts affected by improper contacts almost *only* when they apply the presumption of prejudice. With that showing, respondents disprove their only real argument against review.

ARGUMENT

1. Before turning to their actual grounds for opposing review, respondents spend several pages arguing on the merits that the decision below is consistent with the "most recent of [this Court's] jury intrusion decisions." Opp. Br. at 16. Respondents cannot dispute, however, that the decision conflicts with *Mattox* and *Remmer* themselves, which held unambiguously that "any" ex parte communication with a juror is to be deemed "presumptively prejudicial," leaving the burden on the prevailing party to establish the harmlessness of the conduct. *Remmer*, 347 U.S. at 229. Whatever respondents may have to say about the effect of this Court's subsequent cases on *Mattox* and *Remmer*, only this Court can announce that those cases have been overruled. Pet. at 30. All that matters for present purposes is that the court below and four other federal circuits openly refuse to follow two controlling precedents of this Court because of principles suggested by subsequent precedents, while the remaining courts consider the subsequent precedents distinguishable and thus continue to treat *Mattox* and *Remmer* as controlling.

In any event, for all of respondents' mistimed argument on the merits in respect to this Court's "most recent jury intrusion decisions," respondents simply do not come to terms

with the two things about those decisions that most clearly suggest that they do not undermine the *Mattox/Remmer* rule in federal cases. First, as the petition points out, Pet. at 18-20, all of the more recent cases address only the question whether a hearing is sufficient to protect a party's fair-trial rights when juror misconduct is at issue. Not one of them considers the question whether prejudice may be proved at that hearing by way of a presumption. Respondents ignore that point.

Indeed, in the most recent case, and the case on which respondents most heavily rely, the Court *explicitly* declined to comment on the issue presented here, noting that whether proof of jury prejudice at the hearing rests solely on a "presumption of prejudice" or on a "specific analysis" of all the facts, the "ultimate inquiry" is whether "the intrusion affect[ed] the jury's deliberations and thereby its verdict." *United States v. Olano*, 507 U.S. 725, 739 (1993). We do not disagree. The question here – unanswered in *Olano* – is simply whether that "ultimate inquiry" could be resolved by way of a presumption subject to rebuttal, or whether the party challenging the verdict would have to prove up actual prejudice before relief could be granted. Pet. at 20.

Second, as the petition pointed out, three of the subsequent cases on which courts have relied in declining to apply the *Mattox/Remmer* presumption are habeas cases which arose initially in state courts. Pet. at 20 n.6. Unless the *Mattox/Remmer* rule is itself a constitutional rule, then, the rule could *not* have been applied in those cases. Respondents ignore that point as well.

2. As for arguments against review rather than on the merits, respondents begin by attempting to invoke the "two-court rule," suggesting that the petition "ask[s] this Court to set aside the concurrent findings of no prejudice made by the two courts below, a task that the Court consistently and properly refuses to undertake." Opp. Br. at 15; *see id.* at 21

("the facts have been found by two lower courts and are no longer subject to debate in this Court"). And the very heart of their argument against review is that the question presented here is not important because "[o]n *the facts found by the courts below* the outcome of this case would have been no different in any other circuit." Opp. Br. at 15 (emphasis added). The factual finding on which they rely is the finding that CSO Warrick's "bullet remark" to Juror Graham resulted in "no prejudice" to ExxonMobil. *Id.*

That argument entirely misses the point. The very question presented for review here is whether or not the lower courts' "concurrent findings of no prejudice" from the bullet remark were "predicated on a misunderstanding of the governing rule of law." *Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485, 501 (1984). There is no contention here that the lower courts erred because they misread a document or misjudged the credibility of a witness. The question is whether they erred because they did not apply the proper legal standard – *i.e.*, the *Mattox/Remmer* rule – to the undisputed facts at hand.[1] That is a pure "question of law" subject to plenary review by this Court. *Bose Corp.*, 466 U.S. at 501; *see Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 855 n.15 (1982) ("Of course, if the trial court bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard."); *Pullman-Standard Co. v. Swint*, 456 U.S. 273, 287 (1982) ("if a district court's [factual] findings rest on an erroneous view of the law, they may be set aside on that basis"); *see also Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

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[1] Respondents' contention that the petition's statement of the case "argues the facts de novo," Opp. Br. at 1, is thus seriously misplaced. The statement accurately reports the underlying facts relevant to the legal question at issue, as the *Mattox/Remmer* rule would frame it: whether the CSO Warrick's gun/bullet remark to Juror Graham gave rise to a "reasonable possibility of prejudice."

And the distinction between the *Mattox/Remmer* rule and the legal standard applied by the lower courts here in making their factual findings could hardly be more stark. The district court required ExxonMobil to bear the burden of proving that the conduct "actually coerced" the jury into reaching a verdict it would not otherwise have reached. As explained in the petition, that standard was literally an impossible one to meet, given that Fed. R. Evid. 606(b) strictly prohibits inquiries into actual, subjective effects of a contact on a juror's decisionmaking process.[2] The court's "finding" of "no prejudice," then, was in reality merely a finding that ExxonMobil had been unable to prove an actual impact on the jurors' thought processes given the extraordinary constraints of a rule that prohibits precisely that evidence.

Had it applied the *Mattox/Remmer* rule, by contrast, the court would have presumed prejudice from CSO Warrick's improper contact. The respondents, not ExxonMobil, then would have had the burden to prove that there was "no *reasonable possibility* that the verdict was affected by the contact." *United States v. Sanders*, 962 F.2d 660, 668 (7th Cir. 1992) (emphasis added; internal quotation marks omitted). As the underscored language suggests, the inquiry at this stage would have been an objective one, focusing on the likelihood that the contact *could* have affected the jury's de-

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[2] Rule 606(b) prohibits a juror from testifying "to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict . . . or concerning the juror's mental processes in connection therewith," although a juror may testify to the objective facts concerning the existence of ex parte contacts. Fed. R. Evid. 606(b). The rule merely codified one of the holdings in *Mattox*. *See* Pet. at 17. Respondents read this Court's opinion in *Rushen v. Spain*, 464 U.S. 114 (1983), as effectively amending Rule 606(b) and (again) overruling *Mattox*, in its suggestion that "the effect [of ex parte communications] on juror impartiality [is a] question[] of historical fact." Opp. Br. at 26 n.13 (quoting *Rushen*, 464 U.S. at 120-21 n.5). It is hard to see how *Rushen* could be taken as a comment on *Federal* Rule 606(b), however, inasmuch as *Rushen* was a *state* case arising in habeas.

liberations, rather than on the question whether the verdict was *actually* coerced.

The court did, however, implicitly "find" that Warrick's improper contacts did not "inherently coerce" the jury, as the predicate for refusing to apply a presumption of prejudice under the Ninth Circuit's Byzantine rules governing the presumption. *See* Pet. at 24-25. But the "inherent coercion" inquiry, while at least objective, is also a very different inquiry than *Mattox* and *Remmer* command. The objective standard courts apply under those cases is not whether there is "inherent" prejudice, but whether there is a "*reasonable possibility* of prejudice." Pet. at 29 & n.11. Even putting to one side the assignment of the burden of proof, it is surely much harder to prove that a particular contact is "inherently coercive" than that a contact creates a "reasonable possibility of prejudice."

This case proves the point. The court of appeals affirmed the trial court's finding of no actual coercion on the ground that CSO Warrick's remark "did not purport to tell the individual to whom it was directed, Juror [Graham], what his decision in the case ought to be or how he should make it." Pet. App. at 9a. But even if CSO Warrick's remark did not tell Graham what his decision ought to be, it is a very different question whether the remark created a "reasonable possibility of prejudice" in the jury's deliberations. It is not disputed that the jurors were receiving already enormous – even threatening – pressure from the community. Pet. at 5-6. It is not disputed that Rita Wilson was known by CSO Warrick to be in serious conflict with the other jurors in deliberations. Pet. at 6. It is not disputed that on the very day Warrick made his comment to Graham, the jury declared to the court that it was at impasse, and then again that same day – after the court refused to accept that declaration – that it was at a "crucial stage in our deliberation." Pet. at 7. And, it is not disputed that at this critical time, Juror Wilson was holding

out against the other jurors because she did not believe a punitive damage award was appropriate. Pet. at 9.

In view of those objective facts, respondents would have faced enormous difficulty in trying to prove there was *no* reasonable possibility that the deliberations were prejudiced by the nature and timing of CSO Warrick's comment. Indeed, the *only* "fact" cited by the lower courts in their "actual coercion" analysis that might possibly weigh against the reasonable possibility of prejudice was the conclusion that Juror Graham "perceived the remark as a tasteless joke rather than as a threat or serious suggestion." Pet. App. at 4a; *see id.* at 9a.

That supposed fact is wholly beside the point: no one has ever contended that Warrick was actually proposing a homicide.[3] ExxonMobil's contention from the beginning has been that Warrick's comment had the force and effect of "shoring up" Graham's views and thus his side of the deliberations – telling members of the majority, in effect, that court personnel believed they were in the right and that Juror Wilson was the one failing to do her job. Pet. at 28. The lower courts simply never addressed the reasonable possibility of that kind of prejudice to the deliberations – primarily because of their myopic focus on the question whether the comment "actually" coerced the jurors' $5 billion punitive damages verdict.

The lower courts' finding of "no prejudice" on the undisputed facts thus cannot be extricated from their application of a much tougher legal standard of proof than would have been required by *Mattox* and *Remmer*. For the reasons just discussed, if the courts had applied the *Mattox/Remmer* rule, they should have concluded that a sufficient threat of preju-

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[3] In any event, Juror Graham never once said he thought the comment was a "joke," to be laughed off or ignored. He said, to the contrary, that it "totally freaked me out" and "really shook me up." Pet. at 7.

dice was shown to warrant a new trial.

In point of fact, respondents do not even try to deny that a different result would have been reached under the *Mattox/Remmer* rule. Their argument, rather, is that the Ninth Circuit's "finding" that ExxonMobil was not "actually" prejudiced would preclude a new trial no matter what rule was applied. Relying entirely upon that finding, they say this case raises no controversial issue because we have "cited no case where any court of appeals has ordered a new trial despite finding that an intrusion had no impact on the jury's deliberations." Opp. Br. at 23; *see also id.* at 26-27 n.13. That argument gets them nowhere: the whole point here is that the Ninth Circuit's finding "that [the] intrusion had no impact on deliberations" likely would have been different had the court applied the *Mattox/Remmer* rule. The court's finding under the rule it did apply says nothing about what the outcome would have been under the materially different rule enunciated in *Mattox* and *Remmer* and applied in other circuits. That is the only relevant question, and respondents do not speak to it at all.

3. The rather obvious potential that application of the *Mattox/Remmer* presumption would have made an outcome-determinative difference in this case also disposes of respondents' most overwrought claim: that the question of which party bears the burden to prove prejudice from an improper contact *never* makes a difference in *any* case. *See* Opp. Br. at 28 (the "presumption has no outcome-determinative consequences"); *see generally id.* at 24-29.

The notion that allocation of burden of proof cannot affect factual determinations has never been recognized by this Court in any context. Indeed, this Court's view is to the precise contrary: "In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome." *Speiser v. Randall*, 357 U.S. 513, 525 (1958). Thus, just last Term this Court granted certiorari to decide the sole question

of which party bears the burden of proof on a tax claim in bankruptcy court. *Raleigh v. Illinois Dep't of Revenue*, 120 S. Ct. 1951 (2000). The Court has routinely treated allocation of the burden of proof as an important issue worthy of review. *See, e.g., Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994) (deciding which party bears burden of proof in black lung benefits claim); *Medina v. California*, 505 U.S. 437 (1992) (deciding which party bears burden of proof on defendant's competence to stand trial); *Nishikawa v. Dulles*, 356 U.S. 129 (1958) (deciding whether government or citizen bears burden of proof on question of voluntariness of act of expatriation).

Respondents' own brief confirms beyond any doubt that the question of who bears the burden of proof can and does make a difference in this context. According to respondents' tally of the forty-one cases cited in the petition, courts granted a new trial in eleven cases.[4] In nine of those eleven, the courts applied a presumption of prejudice.[5] By contrast, only two of the forty-one total cases found prejudice in the absence of any presumption. The upshot is clear: unless a presumption of prejudice applies, it is all but impossible to prove the actual prejudice necessary to obtain a new trial even after egregiously improper ex parte jury contacts.

On the other hand, the fact that there are several cases in

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[4] These numbers include *Rinker v. County of Napa*, 724 F.2d 1352 (9th Cir. 1983), which is cited in the petition but apparently not included in respondents' tally.

[5] The cases cited from the Ninth Circuit either were decided when that Circuit followed *Mattox* and *Remmer*, *see Rinker*, *supra*; *United States v. Littlefield*, 752 F.2d 1429 (9th Cir. 1985), or in a case that involved facts under which the presumption arises in accordance with the Ninth Circuit's balkanized rules governing the existence of the presumption, *see United States v. Dutkel*, 192 F.3d 893 (9th Cir. 1999) (presumption applies to jury tampering, even though it is not extraneous information).

which the presumption was applied but the court went on to find no reasonable possibility of prejudice, Opp. Br. at 25-26, simply goes to show the practical workability of the *Mattox/Remmer* framework. The Ninth Circuit's opinion argues at length that a presumption of prejudice should not apply to ex parte contacts because many such contacts are innocuous social contacts, which frequently arise in long trials and in small communities. Pet. App. at 9a-10a. But in any case where the contact is truly innocuous, the presumption should be easily dispelled, assuming such contact is even "improper" in the first place. *Cf.* Pet. at 22 (discussing Fourth Circuit rule). And even where it is not entirely innocuous, courts still may find that there was in fact no reasonable possibility that the verdict was affected, after a full investigation of all the objective facts surrounding the incident, including its exact nature, its timing in relation to the deliberations, and similar factors. *See* Pet. at 29 n.11 (identifying objective factors courts use to evaluate possibility of prejudice).

Though it is mandated by this Court's cases, neither court below imposed on respondents the burden of proving that there was no reasonable possibility that this $5 billion verdict was affected by Warrick's improper conduct. While we are confident of what the outcome would have been had they done so, that is not the immediate point. What matters for present purposes is that "the burden of proof was critical to the resolution of the case," *Raleigh*, 120 S. Ct. at 1954, as it surely has been and will continue to be in many others. The abiding controversy in the federal circuits over the continued vitality of *Mattox* and *Remmer* is well-presented on the facts of the case. This Court should grant review and settle that controversy now.

CONCLUSION

For the foregoing reasons, and for the reasons previously stated, the petition should be granted.

Respectfully submitted,

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contractor defense established, such an analysis would have been consistent with that of every other circuit court to address the issue. *See Lewis*, 985 F.2d at 89; *Ramey v. Martin-Baker Aircraft Co., Ltd.*, 874 F.2d 946, 951 n.9 (4th Cir. 1989); *Dowd v. Textron, Inc.*, 792 F.2d 409, 412 (4th Cir. 1986), *cert. denied*, 487 U.S. 1233, 108 S. Ct. 2897, 101 L. Ed. 2d 930 (1988). Certainly, evidence of a governmental decision — when confronted with the very design defect that plaintiff alleges — to address the problem through pilot instructions, rather than through a design change, is consistent with *Boyle*'s recognition that "[t]he design ultimately selected may well reflect a significant policy judgment by Government officials whether or not the contractor rather than those officials developed the design." 487 U.S. at 513, 108 S. Ct. at 2519.

CONCLUSION

Both the district court and the Fifth Circuit correctly stated and applied the government contractor defense standard set forth in *Boyle*. Furthermore, the result is consistent with the policy rationale underlying the defense. There is no conflict between the lower courts' holdings in this case and this Court's opinion in *Boyle*. Nor is there a conflict among the circuit courts of appeal on any issue raised by Petitioner. In substance, Petitioner's complaint is not with the correctness of the legal standards applied, but rather with the result that those legal standards require in this case. There being no basis in law or in fact for further review of this case, Beech respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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